

TRIAL BY JURY IN FEDERAL CRIMINAL PROCEDURE

LESTER B. ORFIELD*

ARTICLE III of the United States Constitution provides that "The Trial of all Crimes except in Cases of Impeachment, shall be by Jury. . . ." Further, the sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; by an impartial jury. . . ." This right to jury trial has traditionally been one of the most important rights of the criminal defendant.

Rule twenty-three of the Federal Rules of Criminal Procedure, governing jury trial in the federal courts, implements these constitutional jury trial requirements. Although the Federal Rules of Criminal Procedure are comparatively young, there have been suggestions for serious change in rule twenty-three. In order to better evaluate the strengths and weaknesses of the present rule twenty-three, this article will examine the constitutional and historical background of the rule, its interpretation by the courts, and possible reforms.

I

THE CONSTITUTIONAL RIGHT TO JURY TRIAL

A. Grand Jury and Petty Jury Compared

There may be cases in which a defendant is entitled to trial by petty jury where he is not entitled to indictment by a grand jury. It has been so held as to assault and battery in the District of Columbia.¹ The word "crime" in article three as to trial by jury has been held to embrace more than the "infamous" crimes which under the fifth amendment require "presentment or indictment of a Grand Jury."² Nevertheless, in 1866, the Supreme Court held that the "framers of the Constitution doubtless meant to limit the right of trial by jury in the sixth

* Professor of Law, Indiana University. Formerly member of United States Supreme Court Advisory Committee on Rules of Criminal Procedure, appointed in 1941; author of *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* (1947) and *CRIMINAL APPEALS IN AMERICA* (1939).

¹ *In re Robinson*, 20 D.C. 570, 571 (1892).

² *Low v. United States*, 169 Fed. 86, 89 (6th Cir. 1909).

amendment, to those persons who were subject to indictment or presentment in the fifth."³

Where there is no right to trial by jury there is no right to grand jury indictment. As the Supreme Court stated in 1958: "It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for one year are 'infamous crimes' under the fifth amendment although they are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of art. III., sec. 2, and the sixth amendment."⁴ On the whole it must be concluded that the right to trial by jury is at least as broad as the right to a grand jury indictment and probably broader.⁵

B. State Courts

The federal constitutional provisions on the right to trial by jury do not apply to criminal cases in the state courts.⁶ Nor does the federal constitution require that when a jury is used in a state court case it must consist of twelve persons.⁷ Moreover, a state statute providing for trial of murder cases by a struck or special jury does not violate due process.⁸

C. Extradited Defendants

An act of Congress authorizing an American citizen to be extradited to a foreign country for trial therein does not violate the Constitution

³ *Ex parte Milligan*, 71 U.S. (4 Wall.) 123 (1866). This holding was followed in *In re Bogart*, 3 Fed. Cas. 796, 798 (No. 1596) (C.C.D. Cal. 1873).

⁴ *Green v. United States*, 356 U.S. 165, 184 (1958). Judge Learned Hand took the same view in the case below, *United States v. Green*, 241 F.2d 631, 633 (2d Cir. 1957).

⁵ But a "criminal prosecution" under the sixth amendment is narrower than a criminal case under the fifth amendment provision that no person "shall be compelled in any criminal case to be a witness against himself. . . ." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892); *United States v. Zucker*, 161 U.S. 475, 481-82 (1896).

⁶ *Eilenbecker v. Plymouth County*, 134 U.S. 31, 34 (1890); *Ex parte Whistler*, 65 F. Supp. 40, 41 (E.D. Wis. 1945), *appeal dismissed*, 154 F.2d 500 (7th Cir. 1946), *cert. denied*, 327 U.S. 819 (1946).

Trial by jury is not necessary for a violation of a city ordinance where the penalty is a small one. *Natal v. Louisiana*, 139 U.S. 621 (1891). See Note, 31 IND. L.J. 486, 494 (1956). Mr. Justice Brennan in February 1961 in an address at New York University criticized this approach. *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761, 772 n.48 (1961).

⁷ *Maxwell v. Dow*, 176 U.S. 581, 585 (1900) (Mr. Justice Harlan dissenting); *Coates v. Lawrence*, 46 F. Supp. 414, 423 (S.D. Ga. 1942), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759 (1943).

⁸ *Brown v. New Jersey*, 175 U.S. 172, 175 (1899).

merely because the trial will not be by jury. The constitutional provision on jury trial has "no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."⁹ This is so even though the defendant is an American citizen.

D. The District of Columbia, the Territories, and Consular Courts

There is a constitutional right to trial by jury in the District of Columbia.¹⁰ The Supreme Court pointed out that a previous decision of the Supreme Court had taken it for granted that there was a right to jury trial in the incorporated territories.¹¹ In subsequent decisions the Court made it clear that there was such a right in the incorporated territories.¹²

Several cases have held that there is no right to trial by jury in an unincorporated federal territory. It was so held as to Hawaii in 1903;¹³ the Philippine Islands in 1904;¹⁴ Puerto Rico in 1922;¹⁵ and Guam in 1951.¹⁶

Similarly *In re Ross*¹⁷ held in 1891 that there is no right to trial by jury in consular courts established by the United States in foreign countries. The reasoning of the *Ross* case was that the guarantee of jury trial applies only to citizens and others within the United States,

⁹ *Neely v. Henkel*, 180 U.S. 109, 122 (1901).

¹⁰ *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899); *Callan v. Wilson*, 127 U.S. 540 (1888).

¹¹ *Reynolds v. United States*, 98 U.S. 145, 154 (1878). But the question was not in issue. The Court further stated: "By Sect. 1910 of the Revised Statutes the district courts of the Territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States; but this does not make them circuit and district courts of the United States." 98 U.S. at 154.

¹² *Rasmussen v. United States*, 197 U.S. 516 (1905) (Alaska); *Thompson v. Utah*, 170 U.S. 343, 349 (1898).

¹³ *Hawaii v. Mankichi*, 190 U.S. 197, 211 (1903) (four Justices dissenting).

¹⁴ *Dorr v. United States*, 195 U.S. 138 (1904) (Mr. Justice Harlan dissenting).

For recent discussion of the *Insular Cases* see *Reid v. Covert*, 354 U.S. 1, 12-14, 51-54 (1957); 71 HARV. L. REV. 712, 718-20 (1958).

¹⁵ *Balzac v. Puerto Rico*, 258 U.S. 298, 304 (1922). This continues to be the rule. *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 619 (1st Cir. 1956). Art. II, sec. 11 of the Puerto Rico constitution confers a right to trial by jury of twelve in felony cases, but nine of them may render a verdict although three disagree. See the case below, 125 F. Supp. 819, 821 (D.P.R. 1954).

¹⁶ *United States v. Seagraves*, 100 F. Supp. 424, 425 (D. Guam 1951); *Pugh v. United States*, 212 F.2d 761, 762 (9th Cir. 1954). See Comment, *Procedural Right to Jury Trial in an Unincorporated Territory*, 6 HASTINGS L.J. 197 (1954).

¹⁷ 140 U.S. 453, 464 (1891). A consular court in Japan was involved. The case was cited favorably in *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

and not to residents or temporary sojourners abroad. Thus, when the representatives of our country are permitted to try cases abroad, they must do so under the terms agreed to by both countries. However, in *Reid v. Covert*¹⁸ in 1957, the Supreme Court indicated doubt that a similar result would be reached today. The reasoning of *Reid* repudiates that of *Ross*, and is simply that whenever the Government acts abroad against a citizen then the full shield of the Constitution is available for his protection. Consequently it appears likely that today the jury trial provisions of article three and of the sixth amendment apply to both unincorporated territories and consular courts. Congress has now passed a statute abolishing consular jurisdiction.¹⁹

E. Petty Offenses

In *Callan v. Wilson* the Supreme Court held that the jury trial provision in article three of the Constitution should be construed in the light of common law principles.²⁰ Therefore, the constitutional right was held broad enough to cover not only felonies punishable by confinement in the penitentiary, but also some classes of misdemeanors the punishment of which might involve the deprivation of the liberty of the citizen. In that case, a defendant accused of a conspiracy to prevent another person from pursuing a lawful avocation was deemed entitled to trial by jury. The Police Court of the District of Columbia could not try this case although an appeal lay to the Supreme Court of the District of Columbia.²¹ The Court, in an opinion by Mr. Justice Harlan, thought that the sixth amendment did not replace the article three provision on jury trial.²²

¹⁸ 354 U.S. 1, 10-12, 54-64 (1957). Yet a year earlier the case had been regarded as still law. *Kinsella v. Krueger*, 351 U.S. 470, 475 (1956).

¹⁹ Joint Res. of Aug. 1, 1956, ch. 807, 70 Stat. 774 (1956). Extraterritorial jurisdiction terminated in 1899 in Japan, in 1912 in Libya, in 1920 in Thailand, and in 1949 in Egypt. It continued in Morocco until recently.

²⁰ 127 U.S. 540, 549 (1888). In general the test of a petty offense was its effect upon the public at large. See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 968, 979 (1926).

²¹ The offense of libel must be tried by jury. The court was somewhat dubious as to doing away with trial by jury in the District of Columbia by statute. The invalid statute was passed in 1870. For subsequent history of this statute see n.178 *infra* and accompanying text. See also *In re Dana*, 6 Fed. Cas. 1140, 1141 (No. 3554) (S.D.N.Y. 1873).

²² For discussion of the relation between the sixth amendment and art. III, sec. 2, see cases and writings cited in Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 147 n.105 (1932).

The Supreme Court had implied in dictum in 1888 that there were some criminal proceedings in which there was no right to trial by jury.²³ Finally, in 1904,²⁴ it held valid a written waiver by a defendant in an action brought by the United States to recover a penalty of fifty dollars on the ground that misdemeanors punishable by a small fine or short imprisonment are not crimes within the meaning of the Constitution. In construing article three, the Court pointed out that in the original draft of the Constitution the provision was for trial of "all criminal offenses" by jury, but the subsequent substitution of the expression "all crimes" showed an intention to restrict the operation of the provision to grave offenses. The Court quoted a passage from Blackstone in stating that both crimes and misdemeanors were violations of public law and properly mere synonymous terms, but that in common usage only graver offenses were called crimes, and lighter ones, misdemeanors. The Court ascribed to the framers of the Constitution an intention to use the word "crime" in its popular sense.²⁵ Emphasis was placed equally upon the punishment prescribed and the moral delinquency involved.

There followed a series of lower federal court decisions defining petty offenses, some using definitions perhaps too broad today. For instance, a violation of the Food and Drugs Act where the penalty was merely a fine not exceeding two hundred dollars was a petty offense.²⁶ The same was held as to refusal to testify before a military tribunal where the penalty was five hundred dollars or six months imprisonment or both;²⁷ selling liquor where the penalty was a fine of two thousand dollars and six months in jail;²⁸ and violation of the weights

²³ Callan v. Wilson, 127 U.S. 540, 543 (1888).

²⁴ Schick v. United States, 195 U.S. 65 (1904), 5 COLUM. L. REV. 48 (1905). The defendant was prosecuted for receiving for sale oleomargarine not stamped according to law. See Frankfurter & Corcoran, *supra* note 20, at 969-75.

²⁵ But it has been pointed out that it seems more likely that the framers, as lawyers, intended to adopt the word in its proper legal sense. Note, 5 COLUM. L. REV. 48 (1905). See also the dissent of Mr. Justice Harlan, 195 U.S. 65, 98 (1904).

Several passages in the Constitution indicate that when the operation of a provision is meant to be restricted to offenses of a certain gravity, such an intention is clearly shown. In art. I, sec. 8, cl. 10, the expression "felonies on the high seas" is used. The fifth amendment provides for indictment by grand jury as to "capital or otherwise infamous crimes." Under art. II, sec. 4, impeachment is to be for "treason, bribery, or other high crimes and misdemeanors." Under art. IV, sec. 2, cl. 2, extradition is to be for "treason, felony, or other crime."

²⁶ Frank v. United States, 192 Fed. 864, 868 (6th Cir. 1911).

²⁷ United States v. Praeger, 149 Fed. 474 (W.D. Tex. 1907).

²⁸ *Ex parte* Dunlap, 5 Alaska 521 (1916).

and measures law, the penalty being a fifty dollar fine or fifty days imprisonment.²⁹ In a prosecution for fast driving, as distinguished from fast driving endangering human life, with a penalty of from four to forty dollars, it was held that there was no right to trial by jury. It made no difference that the defendant could be imprisoned if he failed to pay the fine. A municipal ordinance was involved and prosecution was in the police court.³⁰ On the other hand, in 1892, it was held that the following crimes committed in the District of Columbia required trial by jury: receiving stolen goods,³¹ gaming,³² petty larceny,³³ and assault and battery.³⁴ It had earlier been held that sale of lottery tickets in violation of statute required trial by jury.³⁵ An offense which might be punished by two year's imprisonment and a fine of \$1,000 has been held not to be a petty offense.³⁶ Where the penalty might be imprisonment for a year, trial by jury was required in cases involving malicious destruction of property³⁷ and violation of liquor laws.³⁸

One of the last important Supreme Court decisions on petty offenses was *District of Columbia v. Colts*,³⁹ decided in 1930. The Court indicated that the test generally employed for determining whether an offense is a petty offense or a crime is its nature. If the offense is *malum in se* or involves such obvious depravity as would shock the general moral sense, it is a crime and not a petty offense, regardless of the amount of its punishment. *Colts* held that there was a right to trial by jury as to reckless driving, the penalty being a fine of from

²⁹ *Gay v. Cuevas Zequeira*, 25 P.R. Fed. 566 (1917).

³⁰ *Bowles v. District of Columbia*, 22 App. D.C. 321, 326 (1903).

³¹ *United States v. Jackson*, 20 D.C. 424, 427 (1892) (motion in arrest of judgment granted).

³² *United States v. Herzog*, 20 D.C. 430, 431 (1892).

³³ *In re Fauldan*, 20 D.C. 433 (1892) (habeas corpus granted).

³⁴ *In re Robinson*, 20 D.C. 570, 571 (1892) (habeas corpus granted).

³⁵ *United States v. Green*, 19 D.C. 230 (1890).

³⁶ *Low v. United States*, 169 Fed. 86, 89 (6th Cir. 1909) (unlawfully carrying on business of a rectifier). The penalty was \$500 and two years' imprisonment on one count, and \$500 on another count.

³⁷ *In re Virch*, 5 Alaska 500 (1916).

³⁸ *Coates v. United States*, 290 Fed. 134 (4th Cir. 1923). The penalties aggregated \$1,000 fine and twelve months in jail.

³⁹ *District of Columbia v. Colts*, 282 U.S. 63 (1930), 31 COLUM. L. REV. 325 (1931), 44 HARV. L. REV. 465 (1931), 9 N.C.L. REV. 308 (1931), 79 U. PA. L. REV. 640 (1931), 40 YALE L.J. 1303 (1931). For the case below see *Colts v. District of Columbia*, 38 F.2d 535 (D.C. Cir. 1930).

twenty-five dollars to one hundred dollars or a jail sentence of from ten to thirty days. The offense was *malum in se*, since driving a horse recklessly was an indictable offense at common law,⁴⁰ and to hold it not a serious offense would shock the general moral sense. The opinion has been sharply criticized for its use of the old distinction between *malum prohibitum* and *malum in se*.⁴¹ It has been suggested that the Court should not make its own interpretation of the general moral sense when a federal statute has prescribed a definite, although arbitrary, standard based on the severity of the punishment.⁴² It should be observed that the Court's focus on the moral depravity of the offense does not necessarily preclude assertion of the right to jury trial based on the penalty provided,⁴³ but it indicates that the latter test may not be relied on to deny the claim to jury trial.

In 1937, the Supreme Court held in *District of Columbia v. Clawans*⁴⁴ that the offense of engaging without a license in the business of a dealer in second hand articles did not require a jury trial. The authorized punishment was a fine of not more than three hundred dollars or imprisonment of not more than ninety days. Professor Rottschaefer states: "It has never yet been determined whether an offense, trial [*sic*] without a jury so far as that depends upon its character, can be converted into a crime within the meaning of these constitutional provisions solely because of the severity of the punishment imposed thereon. . . ."⁴⁵ But the discussion in *Clawans*⁴⁶ warrants an inference that severity of punishment alone may eventually be held a sufficient basis for requiring trial by jury.⁴⁷ In the same year

⁴⁰ This is a dubious proposition. 31 COLUM. L. REV. 325 (1931). In state court prosecutions for drunken driving there is no right to jury trial. 44 HARV. L. REV. 465 (1931).

⁴¹ 31 COLUM. L. REV. 325 (1931); 30 COLUM. L. REV. 74 (1930); 40 YALE L.J. 1303, 1306 (1931).

⁴² 31 COLUM. L. REV. 325 (1931); 40 YALE L.J. 1303, 1307 (1931).

⁴³ The penalty test was applied in *Coates v. United States*, 290 Fed. 134 (4th Cir. 1923); *Frank v. United States*, 192 Fed. 864 (6th Cir. 1911); *Low v. United States*, 169 Fed. 86 (6th Cir. 1909); *United States v. Praeger*, 149 Fed. 174 (W.D. Tex. 1907).

⁴⁴ 300 U.S. 617 (1937) (two Justices dissenting), 35 MICH. L. REV. 1377 (1937), 3 MO. L. REV. 63 (1938). For the holding below see 84 F.2d 265 (D.C. Cir. 1936) (right to jury trial upheld).

⁴⁵ ROTTSCHAEFER, CONSTITUTIONAL LAW 789 (1939). See *Clawans v. District of Columbia*, 84 F.2d 265, 269 (D.C. Cir. 1936).

⁴⁶ 300 U.S. at 627.

⁴⁷ ROTTSCHAEFER, CONSTITUTIONAL LAW 789 (1939).

the Supreme Court held that where a statute provided a fine not to exceed one thousand dollars or imprisonment for not more than six months, or both, attempting to influence a juror was not a petty offense under a federal statute using that phrase and permitting prosecution by information.⁴⁸ There have been no later Supreme Court decisions on point.

Before the Supreme Court decided the *Clawans* case, the Court of Appeals for the District of Columbia held that refusal to grant a jury trial in a prosecution for soliciting prostitution was reversible error where the statute permitted confinement in jail for ninety days.⁴⁹ But two years later, following the *Clawans* decision, the same Court of Appeals held that there was no right to trial by jury in such a case. Historically, no such right existed. Neither the nature of the offense nor the amount of punishment was deemed to require trial by jury.⁵⁰

Could Congress, by redefining a crime, dispense with trial by jury in cases where previously there had been trial by jury? A New Jersey case would seem to indicate that it could. The New Jersey Supreme Court has upheld a state statute which provided that simple assault and battery was disorderly conduct and triable summarily.⁵¹ The statute provided a maximum penalty of a year in jail and a one thousand dollar fine; thus it would seem that trial by jury should have been required.⁵² If the penalty had been only a small fine, the validity of the statute would have been much clearer. Of course, to eliminate a right to trial by jury, Congress should make its intent perfectly clear.

The Supreme Court once seemed to suggest that although Congress might provide for jury trial "of all offenses," including petty offenses, when Congress has not done so, petty offenses may be tried by the court without a jury.⁵³ The question is not a live one, however, since

⁴⁸ *Duke v. United States*, 301 U.S. 492, 495 (1937).

⁴⁹ *Blackburn v. United States*, 84 F.2d 269, 270 (D.C. Cir. 1936).

⁵⁰ *Bailey v. United States*, 98 F.2d 306, 307 (D.C. Cir. 1938).

⁵¹ *State v. Maier*, 13 N.J. 235, 99 A.2d 21, 35 (1953). The prosecution was for spitting on the face and body of another. The decision was four to three.

⁵² 54 COLUM. L. REV. 292 (1954); 52 MICH. L. REV. 746 (1954); 8 RUTGERS L. REV. 545 (1954).

Prior to the passing of the New Jersey statute, Chief Justice Vanderbilt had corresponded with the author. The author had suggested that if the statute altered the definition of the crime and fixed a small penalty, the statute might well be upheld. New Jersey had been troubled with many minor crimes requiring both grand jury indictment and trial by petty jury.

⁵³ *Schick v. United States*, 195 U.S. 65, 70-71 (1904). Mr. Justice Harlan dissented. He would insist on an express statute allowing trial by the court. *Id.* at 97.

the Judiciary Act of 1789 provides that "The trial of issues of fact . . . in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy shall be by jury."⁵⁴ This statute would seem to apply to all crimes, including petty offenses.

The Court of Appeals for the Fifth Circuit has held that even though an offense is petty, it is triable by jury when Congress has not provided for trial without a jury.⁵⁵ The case involved the sale of wild ducks, for which the maximum penalty was six months imprisonment and a fine of five hundred dollars. In the court's view, this had been a petty offense at the date of the Constitution's adoption. A similar view was taken in a prosecution for violating motor carrier safety regulations prescribed by the Interstate Commerce Commission under the Interstate Commerce Act, the penalty being one hundred dollars for the first offense and five hundred dollars for any subsequent offense.⁵⁶

In *United States v. Au Young*,⁵⁷ the court held that in the trial of a petty offense, even though there may be trial by jury, the defendant may waive such trial without the consent of the Government. The court reasoned that under the language of rule twenty-three, consent of the Government to waiver is necessary only when jury trial is constitutionally required. This seems correct, for if the defendant has no constitutional right to jury trial, then a fortiori the prosecution should have no such right.

By act of Congress a "petty offense" is now defined as "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both."⁵⁸ By another act of Congress a United States commissioner specially designated by the court may try a person committing a petty offense in a place subject to exclusive or concurrent federal jurisdiction, if the person consents in writing to be so tried and does not elect to be tried in a district court by a judge without a jury.⁵⁹

⁵⁴ See Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 147, 150 (1932).

⁵⁵ *Smith v. United States*, 128 F.2d 990, 991 (5th Cir. 1942). One judge thought that Congress could not have provided for a trial without a jury. The majority opinion referred to the issue as a "novel" one. For a similar holding see *Latiolais v. United States*, 129 F.2d 323 (5th Cir. 1942).

⁵⁶ *United States v. Great Eastern Lines, Inc.*, 89 F. Supp. 839 (E.D. Va. 1950).

⁵⁷ *United States v. Au Young*, 142 F. Supp. 666, 667 (D. Hawaii 1956).

⁵⁸ 18 U.S.C. § 1 (1958). The statute was applied in *United States v. Au Young*, 142 F. Supp. 666, 667 (D. Hawaii 1956).

⁵⁹ 18 U.S.C. § 3401 (1958).

F. Miscellaneous Proceedings

There is no right to trial by jury in proceedings which are not technically criminal in their nature, such as civil proceedings for the enforcement of forfeitures,⁶⁰ or for the collection of penalties.⁶¹ Similarly, it has been held that a deportation proceeding does not involve the right to trial by jury.⁶² If, however, the statute permits the infliction of punishment of an infamous character, an alien could then demand a jury trial.⁶³ It has also been held that there is no right to trial by jury in a mandamus proceeding.⁶⁴

G. Criminal Contempt

In 1889 a circuit court stated: "Nobody has ever claimed, so far as we are aware, that a party is entitled to a trial by jury in a proceeding for contempt."⁶⁵ In 1890 Mr. Justice Miller, speaking for the Supreme Court, announced: "If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it."⁶⁶ In 1894 Mr. Justice Harlan stated: "Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury."⁶⁷ In 1895 Mr. Justice Brewer wrote:

"But the power of a court to make an order carries with it the equal power

⁶⁰ *United States v. Zucker*, 161 U.S. 475, 481 (1896). See *Frankfurter & Corcoran, Petty Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 937, 991 (1926).

⁶¹ *Hepner v. United States*, 213 U.S. 103, 115 (1909) (Government may have a directed verdict in its favor); *accord*, *United States v. Thompson*, 41 Fed. 28 (C.C.S.D.N.Y. 1889). *Contra*, *Atchison T. & S.F. Ry. v. United States*, 172 Fed. 194, 195 (7th Cir. 1909).

⁶² *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 488 (1894). This was a dictum, as the issue was trial by jury in contempt cases.

⁶³ *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (three Justices dissenting).

⁶⁴ *Wong Wing v. United States*, 163 U.S. 228 (1896). Nor in habeas corpus under 28 U.S.C. § 2255 (1958).

⁶⁵ *In re Terry*, 37 Fed. 649, 651 (C.C.N.D. Calif. 1889). See Note, 65 YALE L.J. 846 (1956); *Frankfurter & Greene, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

⁶⁶ *Eilenbecker v. Plymouth County*, 134 U.S. 31, 36 (1890) (state court proceeding involved). In *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), the Supreme Court asserted that federal courts have the contempt power as a matter of inherent right and no mention was made of jury trial.

⁶⁷ *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 489 (1894).

to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."⁶⁸

In 1914 the Supreme Court in an opinion by Mr. Justice Holmes agreed that there was no constitutional right to trial by jury in contempt cases, although in England "it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way."⁶⁹ In 1924 the Supreme Court announced through Mr. Justice McReynolds: "While contempt may be an offense against the law and subject to appropriate punishment certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding."⁷⁰

In 1914 Congress passed the Clayton Act⁷¹ providing for trial by jury in certain classes of contempts. The decisions of the lower federal courts upon the Clayton Act were in conflict, but the validity of that statute was upheld by the Supreme Court in 1924.⁷² In one respect, the decision was narrow in its scope. The contemnor under the Clayton Act is entitled to a jury trial only if the act constituting the contempt is

⁶⁸ *In re Debs*, 158 U.S. 564, 594-95 (1895). But an advisory jury was used in *In re Steiner*, 195 Fed. 299, 303 (S.D.N.Y. 1912). In *Offutt v. United States*, 348 U.S. 11, 18 (1954), the Court remanded for trial by a different judge.

⁶⁹ *Gompers v. United States*, 233 U.S. 604, 611 (1914).

The late Professor Edgar N. Durfee once stated: "Contrary to the notion prevailing in the profession for some two centuries past, recent research has disclosed that in the Common Law courts trial by jury obtained in contempt proceedings down to the eighteenth century, at which time these courts, in ignorance of their own precedents, absorbed the summary procedure of Star Chamber." DURFEE, *CASES ON EQUITY* 154 n.7 (1928), citing 24 L.Q. REV. 184, 266, and 25 L.Q. REV. 238, 354. See also Note, 23 MICH. L. REV. 516, 517 (1925); Frankfurter & Greene, *supra* note 65.

⁷⁰ *Meyers v. United States*, 264 U.S. 95, 104-05 (1924).

⁷¹ Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes (Clayton Act), 38 Stat. 730, 738, 740 (1914).

⁷² *Michelson v. United States*, 266 U.S. 42, 63 (1924), 25 COLUM. L. REV. 229 (1925), 10 CORNELL L.Q. 215 (1925), 13 GEO. L.J. 50 (1925), 10 IOWA L. REV. 243 (1925), 23 MICH. L. REV. 516 (1925), 9 MINN. L. REV. 368 (1925), 13 N.Y.L.J. 236 (1925), 4 ORE. L. REV. 145 (1925), 3 TEXAS L. REV. 206 (1925), 11 VA. L. REV. 638 (1925). See Frankfurter & Greene, *supra* note 65, at 1036.

also a crime under any federal statute or under the laws of any state in which the act was committed. Thus the court left open the question of Congressional power to provide for a jury trial in civil contempts.⁷³ The Court did not rest upon the distinction between courts created by the Constitution and courts created by Congress, asserting that even in the case of the lower federal courts, which are of the latter class, the attributes which inhere in that judicial power "and are inseparable from it can neither be abrogated nor rendered practically inoperative."⁷⁴ The Court intimated clearly that the decision would have been otherwise if the act had included acts committed in the presence of the court or so near thereto as to obstruct the administration of justice. The limitations on the legislative power to regulate the judicial power as to contempt are determined by the degree of interference with the administration of justice which the regulation involves. The provision for trial by jury on demand of the accused was mandatory, even though the word "may" was used in the statute.

It has been held that statutory provisions for an injunction against dealing in liquor and summary contempt proceedings for violating the injunction do not violate the right to trial by jury or due process.⁷⁵ There is some contrary authority.⁷⁶ It has also been held that trial by jury is not required in suits to abate a public nuisance;⁷⁷ but if courts sustain injunctions against acts which are neither localized, dangerous to the state's property rights, nor wrongful except as forbidden by the penal law, there is real danger of encroaching upon the right to jury trial through statutory extension of equitable jurisdiction.⁷⁸

In criminal proceedings for violation of a restraining order issued in a suit for a declaratory judgment regarding the defendants' right to terminate an agreement covering terms and conditions of employ-

⁷³ It has been suggested that Congress could provide for trial by jury in civil contempt cases. 45 MICH. L. REV. 469, 506 (1947).

⁷⁴ *Michaelson v. United States*, 266 U.S. 42, 66 (1924).

⁷⁵ *Simon v. United States*, 62 F.2d 13 (9th Cir. 1933); *Wedel v. United States*, 2 F.2d 462 (9th Cir. 1924); *United States v. Lockhart*, 33 F.2d 597, 600 (D. Neb. 1929).

⁷⁶ *United States v. Cunningham*, 37 F.2d 349 (D. Neb. 1929), approved in 30 COLUM. L. REV. 730 (1930), 43 HARV. L. REV. 1159 (1930); *United States v. Cunningham*, 21 F.2d 800 (D. Neb. 1927).

⁷⁷ *United States v. Reisenweber*, 288 Fed. 520, 523 (2d Cir. 1923); *Lewinsohn v. United States*, 278 Fed. 421, 428 (7th Cir. 1921).

⁷⁸ 30 COLUM. L. REV. 730 (1930); 29 COLUM. L. REV. 212 (1929); 43 HARV. L. REV. 1159 (1930); 28 MICH. L. REV. 440 (1930).

ment in respect to coal mines in government possession, the defendant had no right to trial by jury. The Norris-LaGuardia Act was held not to apply, although four Supreme Court justices dissented on this point.⁷⁹ The penalty imposed was heavy—a seven hundred thousand dollar fine. This case implies that in criminal contempt proceedings the mere severity of the penalty does not give a right to trial by jury. There is no division of contempts into petty, not requiring jury trial, and serious, requiring it.

In 1952 the Supreme Court held, five to three, that where defense counsel in a criminal trial were guilty of contempt of court in the presence of the judge during the trial, the trial judge may punish summarily at the end of the trial without trial by jury.⁸⁰ Justices Black and Douglas thought that the defendant had a constitutional right to trial by jury.⁸¹ In 1956 a Court of Appeals reversed a criminal contempt conviction and remanded the case with directions to determine “whether the safeguards of the fifth amendment . . . and the protections of the sixth amendment . . . shall be accorded to one upon a charge” under rule 42(b) on criminal contempt.⁸²

In 1958 the Supreme Court held, five to four, that violation of a surrender order of defendants on bail could be tried without a jury.⁸³ It made no difference that the defendants were sentenced to three years’ imprisonment. The majority reasoned that such procedure had long been the practice, that the power is necessary to the courts, and that contempt is not a crime. Justice Frankfurter, concurring, thought it

⁷⁹ *United States v. United Mine Workers of America*, 330 U.S. 258 (1947), criticized in 15 GEO. WASH. L. REV. 497, 60 HARV. L. REV. 811, 45 MICH. L. REV. 469, 472, 506, 9 U. PITT. L. REV. 30. See also Watt, *The Divine Right of Government by Judiciary*, 14 U. CHI. L. REV. 409, 423-36 (1947).

The Norris-LaGuardia Act seemed in its section eleven to provide a wider right to trial by jury than did the Clayton Act.

⁸⁰ *Sacher v. United States*, 343 U.S. 1 (1952), 37 CORNELL L.Q. 795, 66 HARV. L. REV. 170, 36 MINN. L. REV. 965, 26 SO. CAL. L. REV. 90, 6 VAND. L. REV. 120. For the case below see 182 F.2d 416 (2d Cir. 1950).

⁸¹ 343 U.S. 14, 20-23, 89. They also, in a somewhat similar case, *Offutt v. United States*, 348 U.S. 11, 18 (1954), reversing 208 F.2d 84 (D.C. Cir. 1953), 24 FORDHAM L. REV. 144, 69 HARV. L. REV. 160, 9 RUTGERS L. REV. 760, 8 VAND. L. REV. 643, contended that there should be trial by jury. The majority of the Court remanded the case for trial before a different judge.

⁸² *Matusow v. United States*, 229 F.2d 335, 345-46 (5th Cir. 1956).

⁸³ *Green v. United States*, 356 U.S. 165, 183 (1958), affirming 241 F.2d 631, 633 (2d Cir. 1957), affirming 140 F. Supp. 117, 121 (S.D.N.Y. 1956), 38 B.U.L. REV. 316, 25 BROOKLYN L. REV. 118, 72 HARV. L. REV. 153, 18 LAW. GUILD REV. 49, 36 U. DET. L.J. 180.

was up to Congress to grant trial by jury in this situation. The minority argued that historically the procedure was otherwise, that the power is unnecessary, as shown by the Clayton Act and the Norris-LaGuardia Act, and that contempt is a crime. In any event, the holding was unnecessary, as the defendants insisted on grand jury indictment but not trial by jury.

It has recently been held that failure to obey a subpoena to testify before a grand jury may be prosecuted without trial by jury as a contempt, since there is no statutory right to trial by jury in a case where no act of Congress or of a state has made the act a crime.⁸⁴ A failure to obey a subpoena to appear at trial may also be prosecuted as a contempt without trial by jury.⁸⁵

H. The Armed Forces

In *Ex parte Milligan*,⁸⁶ the Court held that Congress does not have the power to authorize military courts to try ordinary civilians in the United States for offenses committed by them where the ordinary federal courts are open and in the unobstructed exercise of their jurisdiction.

The Court later held that the constitutional guaranty of trial by jury does not limit the power of Congress to make offenses against the law of war triable by military tribunals or extend the right to demand a jury to trials by military commission.⁸⁷ Both American citizens and aliens may be so tried. This decision did not overrule the *Milligan* case, but distinguished it on its facts. *Milligan* was a non-belligerent, unassociated with the armed forces of the enemy. On the other hand, an alien spy is not entitled to trial by jury in time of war.⁸⁸ The trial of military prisoners, including those who have been dishonorably discharged from the armed forces for offenses such as murder committed during their imprisonment, may be had before a court martial, in which there is no jury.⁸⁹ It makes no difference that the prior

⁸⁴ *United States v. De Simone*, 267 F.2d 741, 744 (2nd Cir. 1959).

⁸⁵ *James v. United States*, 275 F.2d 332, 336 (8th Cir. 1960).

⁸⁶ 70 U.S. (4 Wall.) 2 (1866).

⁸⁷ *Ex parte Quirin*, 317 U.S. 1 (1942), 12 BROOKLYN L. REV. 135, 29 CORNELL L.Q. 53, 31 ILL. B.J. 216, 17 TEMP. L.Q. 200, 17 TUL. L. REV. 475.

⁸⁸ *Id.* at 42; *United States ex rel. Wessel v. McDonald*, 265 Fed. 754, 760 (E.D.N.Y. 1920). But see Note, 41 MICH. L. REV. 481, 491 (1942).

⁸⁹ *Kahn v. Anderson*, 255 U.S. 1, 8 (1921). See also *Carter v. McClaghry*, 183 U.S. 365, 383 (1902); *Ex parte Reed*, 100 U.S. 13, 21 (1879); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857); *Ex parte Wildman*, 29 Fed. Cas. 1232 (No.

sentence resulted in discharge. However, a soldier who has committed an offense while in the service cannot be tried by court martial for his offense after his honorable discharge from the service.⁹⁰

Civilian dependents and employees of the armed forces overseas are not subject to court martial jurisdiction. They are entitled to trial by jury⁹¹ for noncapital as well as capital offenses.

I. Plea of Guilty

The Supreme Court, reviewing a state court decision, stated broadly that, both at common law and today, no jury trial is necessary upon the plea of guilty, even in capital cases.⁹² The sixth amendment does not require jury trial when the defendant pleads guilty. As one federal court reasoned: "The accused by the plea of guilty, eliminated all issues of fact, and left nothing to be submitted to a jury."⁹³ Many cases have supported this view⁹⁴ even when the charge is first degree murder and the penalty might be death.⁹⁵ In upholding the validity of a waiver of jury trial for petty offenses, the Supreme Court pointed out that when the defendant pleads guilty he waives jury trial. "Can it be that a defendant can plead guilty of the most serious, even a capital offense, and thus dispense with all inquiry by a jury, and cannot when

176532) (D. Kan. 1876); *In re Bogart*, 3 Fed. Cas. 796, 798 (No. 1596) C.C.D. Calif. 1873). *Kahn v. Anderson* was referred to in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14, 29, 44 (1955), but was not expressly overruled.

⁹⁰ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16-23 (1955) (three Justices dissenting), 70 HARV. L. REV. 107, 55 MICH. L. REV. 114, 40 MINN. L. REV. 705. For the decisions below, see *Talbott v. United States*, 215 F.2d 22, 25 (D.C. Cir. 1954); *Toth v. Talbott*, 114 F. Supp. 468 (D.D.C. 1953).

⁹¹ *Grisham v. Hagan*, 361 U.S. 278 (1960) (civilian employee); *Kinsella v. United States*, 361 U.S. 234 (1960) (civilian dependent); *McElroy v. United States*, 361 U.S. 281 (1960) (civilian employee), 74 HARV. L. REV. 116, 45 IOWA L. REV. 888, 20 LA. L. REV. 714; 21 OHIO ST. L.J. 438. See generally Everett, *Military Jurisdiction Over Civilians*, 1960 DUKE L.J. 366.

⁹² *Hallinger v. Davis*, 146 U.S. 314, 318 (1892).

⁹³ *West v. Gammon*, 98 Fed. 426, 428 (6th Cir. 1899).

⁹⁴ *Bridges v. United States*, 259 F.2d 611, 617 (9th Cir.), *cert. denied*, 358 U.S. 847 (1958); *Lipscomb v. United States*, 226 F.2d 812, 813 (8th Cir.), *cert. denied*, 350 U.S. 971 (1955); *Donnelly v. United States*, 185 F.2d 559, 560 (10th Cir.), *cert. denied*, 340 U.S. 949 (1950); *Hood v. United States*, 152 F.2d 431, 433 (8th Cir. 1946); *United States v. Colonna*, 142 F.2d 210, 213 (3d Cir. 1944); *Cooke v. Swope*, 28 F. Supp. 492, 493 (W.D. Wash. 1939); *United States v. Harrison*, 23 F. Supp. 249, 252 (S.D.N.Y. 1938).

⁹⁵ *Donnelly v. United States*, 185 F.2d 559, 561 (10th Cir.), *cert. denied*, 340 U.S. 949 (1950).

informed against for a petty offense waive a trial by jury?"⁹⁶ When the Supreme Court upheld the validity of waiver in felony cases, the argument of public policy against waiver was met by the fact "that the accused may plead guilty and then dispense with a trial altogether."⁹⁷ This reasoning has been criticized as being fallacious. "Under the plea of guilty there is no issue and hence no trial is necessary. But the defendant's power to confess the charge against him does not give him control over the method by which the issue shall be tried by the court without a jury."⁹⁸ Mr. Justice Douglas in a dissenting opinion has pointed out: "The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman's waiver of a jury trial. What the Constitution requires is that the 'trial' of a crime 'shall be by jury.'"⁹⁹ In addition, in some jurisdictions a plea of guilty will not be accepted in a capital case.¹⁰⁰

J. Pleadings and Motions Before Trial

What right is there to trial by jury of issues raised by pleadings and motions before trial? This is a matter of great uncertainty, the decisions usually being very brief and unreasoned. Furthermore, usually the courts do not make it clear whether or not they are laying down a rule of constitutional law or merely a rule of criminal practice.¹⁰¹ Determination of a plea to the jurisdiction has been left to the jury at the trial itself when its propriety depended on the existence of certain facts not admitted.¹⁰² In a subsequent case, separate trial of the issue of territorial jurisdiction was denied. The court ordered it "to be

⁹⁶ *Schick v. United States*, 195 U.S. 65, 71 (1904). Mr. Justice Harlan in dissent admitted that a guilty plea even in a murder case made a jury unnecessary. "What the Constitution requires is that the *trial* of a crime shall be by jury." 195 U.S. at 81-82.

⁹⁷ *Patton v. United States*, 281 U.S. 276, 305 (1930).

⁹⁸ PERKINS, *CASES ON CRIMINAL LAW AND PROCEDURE*, 944 (2d ed. 1959).

⁹⁹ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 281, 284 (1942).

¹⁰⁰ 10 U.S.C. § 845(b) (1958); N.Y. CODE OF CRIMINAL PROCEDURE § 332.

¹⁰¹ Similarly, in equity cases where the plaintiff seeks an injunction plus damages, the courts in asserting that there must be trial by jury as to damages have not made it clear whether this was a rule of constitutional law or of practice. *L. Martin Co. v. L. Martin & Wilckes Co.*, 75 N.J. Eq. 257, 72 Atl. 294 (1909).

¹⁰² *Wright v. United States*, 158 U.S. 232, 234, 238 (1895). A special verdict of the jury was taken as to a crime committed outside the jurisdiction of any state in *United States v. Jackalow*, 66 U.S. 484 (1861).

tried by the jury along with the merits," although the defendant had requested a separate trial.¹⁰³

Rulings with respect to pleas in abatement have often been made by the court without a jury. Decision was by the court where illegal drawing of the grand jury was alleged,¹⁰⁴ and where there was no competent evidence before the grand jury returning the indictment.¹⁰⁵ Where a plea in abatement alleged that the grand jury had no power to act because its term had expired, a Court of Appeals stated: "It seems to be conceded that this trial should be before a jury . . . but upon that question we express no opinion, leaving it for the determination of the trial court in the first instance."¹⁰⁶ The Supreme Court, in reversing the writ of mandamus issued by the Court of Appeals, made no reference to any need for jury trial and seemed to imply that the trial court could pass on the plea when it raised only issues of law.¹⁰⁷ However, the Court did not deny that, if the plea in abatement and the pleadings of the Government raised issues of fact, then there should be trial by jury.

In a case where the defendant alleged in his plea in abatement that a member of the grand jury was not qualified because he was an alien, the trial court overruled the plea as a matter of law.¹⁰⁸ However, at the request of the Government, there was a submission of the same issue to the trial jury, "presumably out of abundant caution."¹⁰⁹ The trial jury, like the court, found that the defendant was naturalized. There was no need to submit the issue to a jury other than the trial jury; but

¹⁰³ Price v. United States, 68 F.2d 133 (5th Cir. 1934).

¹⁰⁴ Agnew v. United States, 165 U.S. 36, 40, 41 (1897); Morris v. United States, 128 F.2d 912, 914 (5th Cir. 1942). But in United States v. Upham, 43 Fed. 68 (C.C.S.D. Ala. 1890), the jury apparently passed on the plea, but did so under instructions by the court to find for the defendant.

¹⁰⁵ United States v. Jones, 16 F. Supp. 135 (S.D.N.Y. 1936); United States v. Goldman, 28 F.2d 424, 431 (D. Conn. 1928).

¹⁰⁶ Evaporated Milk Ass'n v. Roche, 130 F.2d 843, 846 (9th Cir. 1942). The trial court had stricken out the pleas in abatement. Mandamus was granted by the Court of Appeals to compel the trial court to pass on the issues raised by the pleas in abatement.

¹⁰⁷ Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27 (1943). At an early stage the government had filed replication to the plea, and the issues then raised were set for trial before a jury. But later, the replications were withdrawn, and demurrers were filed, thus raising only issues of law.

¹⁰⁸ Jones v. United States, 179 Fed. 584, 590-93 (9th Cir. 1910).

¹⁰⁹ Here the trial court considered the issue as a matter of law based on documents showing naturalization. The jury considered the issue of identity of the name of the juror and the person naturalized. *Id.* at 592.

if a demand had been submitted to the trial court for another jury, "doubtless" the trial court would have granted the demand. Since demand had not been made, the Court of Appeals would not review the matter. The evidence for the Government was full and complete; and the defendant had offered no evidence to the contrary.

In another case, the court denied a preliminary trial on a plea in abatement alleging misnomer of a defendant, "and ordered that the plea be tried with the merits."¹¹⁰ The alleged misnomer was of the first name of the defendant; and the court ruled: "The issues of fact as to the meaning of the words 'Luigi' and 'Louis', as well as the existence of misnomer in the indictment, were left to the jury for decision. We think their action was more favorable to the appellant than the record warranted."¹¹¹ Subsequently a Court of Appeals pointed out that on a plea of abatement for misnomer, historically the "question thus raised was tried by a jury and if the finding was in favor of the defendant, the indictment was abated."¹¹² It has been held that decision was properly by the court on a plea in abatement raising the defense of the privilege against self-incrimination.¹¹³ Similarly, decision was by the court on a plea in abatement raising the defense of the statute of limitations.¹¹⁴

Decision was rendered by the court on a motion to quash where, from the inspection of the indictment, it became clear that if a jury should find the defendant guilty under the evidence on which it was conceded that the Government would be compelled to rely, a new trial would necessarily be granted.¹¹⁵ The situation was like that of a directed verdict of acquittal. Likewise, decision was by the court on a

¹¹⁰ *Capriola v. United States*, 61 F.2d 5, 6 (7th Cir. 1932), *cert. denied*, 287 U.S. 671 (1933).

¹¹¹ *Id.* at 12.

¹¹² *United States v. Fawcett*, 115 F.2d 764, 767 (3d Cir. 1940).

¹¹³ *United States v. Thomas*, 49 F. Supp. 547 (W.D. Ky. 1943). The decision was against the defendant. The defendant had waived the privilege in testifying before the grand jury.

In *United States v. Shaw*, 33 F. Supp. 531, 532 (S.D. Calif. 1940), the decision was by the court on "admitted facts" contained in the "sworn plea" of the defendant, and waiver was found.

In both of these cases, self-incrimination in prior proceedings was involved. In another case, the jury passed on this issue. *Mulloney v. United States*, 79 F.2d 566, 574 (1st Cir. 1935), *cert. denied*, 296 U.S. 658 (1935).

¹¹⁴ *United States v. Hewecker*, 79 Fed. 59, 60 (C.C.S.D.N.Y. 1896) (plea upheld).

¹¹⁵ *United States v. Kuhl*, 85 Fed. 624, 625 (S.D. Iowa 1898).

motion to quash an indictment because no women were on the grand jury panel.¹¹⁶

Treating a plea in abatement as a plea in bar where the defense of the statute of limitations was raised, the Supreme Court held that the defense must be raised under the general issue.¹¹⁷ In a later case, a federal court passed upon a plea in bar raising the statute of limitations after a jury trial of the issue had been waived. By agreement of the parties, the court tried the issues of law and fact involved in the plea.¹¹⁸

In cases in which the plea of double jeopardy has been filed, the Supreme Court has raised no objection to procedure under which the court instructs the jury to bring in a directed verdict against the defendant at the trial of the general issue and before a verdict on the plea of not guilty.¹¹⁹ Subsequently it was held that a trial court could pass on questions of law raised by a plea of former acquittal.¹²⁰ In that case there had been no questions of fact to be disposed of by a jury; and the defendant had waived his right, if he had ever had any, to other disposition of the case by consenting to go to trial. It was not denied that in some cases there might be issues of fact to submit to the jury. In another case, decision on a plea of acquittal was by the court.¹²¹ The court ruled on an issue of law and held that since there had been no previous valid information filed against the defendant, he had not been in jeopardy. In yet another case the court tried the

¹¹⁶ *United States v. Roemig*, 52 F. Supp. 857, 858 (N.D. Iowa 1943) (motion granted).

¹¹⁷ *United States v. Barber*, 219 U.S. 72, 78 (1911). See also *United States v. Kissel*, 218 U.S. 601 (1910) (continuing conspiracy); *United States v. O'Brien*, 27 Fed. Cas. 212 (No. 15908) (C.C.D. Kan. 1873). But a motion to dismiss an information raising the bar of the statute of limitations was treated as a plea in bar in *United States v. Goldman*, 277 U.S. 229, 236 (1928). The trial court ruled on the motion to dismiss and granted the motion.

¹¹⁸ *Brouse v. United States*, 68 F.2d 294 (1st Cir. 1933). The court ruled against the defendant.

¹¹⁹ *United States v. Ball*, 163 U.S. 662, 665 (1896); *Thompson v. United States*, 155 U.S. 271, 273 (1894). See also *Territory v. West*, 14 N.M. 546, 99 Pac. 343, 345 (1909).

¹²⁰ *United States v. Peters*, 87 Fed. 984, 986 (C.C.D. Wash. 1898), *aff'd*, 94 Fed. 127, 135 (9th Cir. 1899), *cert. denied*, 176 U.S. 684 (1900). The question of law involved was whether the verdict rendered on the first trial operated to acquit defendant on all counts of the indictment.

¹²¹ *United States v. J. L. Hopkins & Co.*, 228 Fed. 173, 175 (S.D.N.Y. 1912). The decision was against the defendant.

issue after a waiver of jury trial by all the parties.¹²² This case appeared to involve an issue of fact—was the crime in the prior indictment the same as that charged in the present indictment? The Government filed a replication to the plea after a demurrer filed by it had been overruled.

In one case the Supreme Court raised, but did not decide, the question of whether the defendant had been deprived of his constitutional right to trial by jury when the trial court directed the jury to find a verdict against him on his plea of immunity with respect to the privilege against self incrimination.¹²³ In subsequent proceedings in this case, both the lower court¹²⁴ and the Supreme Court¹²⁵ held that the determination by the jury against the defendant on a directed verdict was valid, neither side having asked that the case be submitted to a jury. In some subsequent cases a jury has found against a claim of immunity under instructions of the court.¹²⁶ Other cases have held that the court may rule upon the plea of immunity.¹²⁷ Since in ordinary jury trials there can be no direction of a verdict of guilty, it seems arguable that no constitutional right is involved in these cases.

Where the defendant pleads on a special plea in bar the privilege against self incrimination, it has been held that this is a mere matter of defense determinable under the general issue; therefore, the issue will be dealt with at the trial.¹²⁸ This holding is not a strong one on its facts, since no privilege was involved where the defendant did not fear federal, but state, prosecution. However, in a subsequent case it was held that the trial court could rule on the plea, since the case was not yet at issue.¹²⁹ The parties raised no question as to a trial of the issues by the court, and the court upheld the plea in bar. As late as 1937 a court stated: "Numerous cases are called to the attention of the court in which issues raised by special pleas in bar were tried before

¹²² *United States v. Weiss*, 293 Fed. 992, 994 (N.D. Ill. 1923).

¹²³ *Heike v. United States*, 217 U.S. 423, 428 (1910). The court dismissed the writ of error, as no final judgment had been rendered.

¹²⁴ *United States v. Heike*, 175 Fed. 852, 856, 860 (C.C.S.D.N.Y. 1910).

¹²⁵ *Heike v. United States*, 227 U.S. 131, 140 (1913).

¹²⁶ *Sherwin v. United States*, 268 U.S. 369, 370 (1925); *United States v. Greater N.Y. Live Poultry Chamber of Commerce*, 34 F.2d 967 (S.D.N.Y. 1929).

¹²⁷ *United States v. Greater N.Y. Live Poultry Chamber of Commerce*, 33 F.2d 1005 (S.D.N.Y. 1929); *United States v. Goldman*, 28 F.2d 424, 432 (D. Conn. 1928); *United States v. Eisele*, 52 F. Supp. 105 (D.D.C. 1943).

¹²⁸ *United States v. Murdock*, 284 U.S. 141, 149 (1931).

¹²⁹ *United States v. Eisele*, 52 F. Supp. 105, 108 (D.D.C. 1943).

a jury. . . . There can be no question of a defendant's rights in that respect upon a proper showing of sufficient issues that the defendants herein do not make."¹³⁰ Even if tenable issues were presented by the plea, they could be tried together with the issue upon the indictment itself, and application therefor could be made at the trial, as in the case of consolidation of indictments.

A motion to dismiss under rule twelve cannot be used to challenge the truth of the allegations in the indictment. In such a case issues of fact are involved which should be tried by the jury.¹³¹ A district court has held that no jury trial is necessary for issues raised with respect to the authority of an assistant United States attorney in connection with a grand jury proceeding, the powers of a grand jury, the presence of unauthorized persons in a grand jury room, and the absence of evidence to support an indictment.¹³² The Constitution did not require a jury trial in such cases and the uniform practice has been not to grant them. A Court of Appeals has concluded that where there is no issue as to the facts, the judge should pass on the issue of *res judicata*.¹³³

K. Present Insanity

The federal courts are governed by the practice at common law as to the method of trying the issue of present insanity where this objection is urged in bar of trial.¹³⁴ Under such practice the defendant has no absolute right to jury trial. Rather, the judge may, in his discretion, pass on the issue himself on his own inspection of the defendant, or direct the question to be tried by a jury under a plea of not guilty.

¹³⁰ *United States v. Noble*, 19 F. Supp. 527, 530 (W.D.N.Y. 1937). The court cited only three cases.

¹³¹ *Universal Milk Bottle Service v. United States*, 188 F.2d 959, 962 (6th Cir. 1951). See Orfield, *Pleadings and Motions Before Trial in Federal Criminal Procedure*, 29 *FORDHAM L. REV.* 1, 63-67, 76-77 (1960).

¹³² *United States v. Smyth*, 104 F. Supp. 279, 282 (N.D. Cal. 1952). The defendant waived a jury trial in open court.

¹³³ *United States v. Sealfon*, 161 F.2d 481, 484 (3rd Cir. 1947), *rev'd on other grounds*, 332 U.S. 575 (1948).

¹³⁴ *Lee v. United States*, 91 F.2d 326, 331 (5th Cir. 1937) (insanity after verdict); *Whitney v. Zerbst*, 62 F.2d 970, 972 (10th Cir. 1933); *Youtsey v. United States*, 97 Fed. 937, 943 (6th Cir. 1899); *United States v. MacLeod*, 83 F. Supp. 372 (E.D. Pa. 1949); *United States v. Boylen*, 41 F. Supp. 724 (D. Ore. 1941); *United States v. Fore*, 38 F. Supp. 140 (S.D. Cal. 1941); *United States v. Harriman*, 4 F. Supp. 186 (S.D.N.Y. 1933).

In *Owens v. United States*, 85 F.2d 270, 271 (D.C. Cir. 1936), a jury was actually used. See Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 *YALE L.J.* 684 (1944).

Under a 1949 statute,¹³⁵ if the issue of a defendant's sanity or mental competence is raised before trial, the court should have him examined by a psychiatrist, and upon a report indicating present insanity, the court must hold a hearing and make a report with respect thereto. The Supreme Court has held that this statute is constitutional and is not confined to cases of temporary mental disorder.¹³⁶ The court may commit the defendant to the custody of the Attorney General until he becomes competent to stand trial. The Supreme Court based the power of Congress in such cases on the necessary and proper clause.¹³⁷ There was no suggestion of any right to trial by jury.

L. Right to an Impartial Jury

In an early case Chief Justice Waite stated: "By the Constitution of the United States (Amend. VI.), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, 'be indifferent as he stands unsworn.'"¹³⁸

The sixth amendment expressly requires that the jury be an impartial one.¹³⁹ Doubtless this would bar any legislation preventing a defendant from challenging jurors for causes going to their fairness and impartiality. But it does not prevent Congress from excluding as grounds for challenges, those causes which do not go to this matter. Therefore, a statute making certain classes of federal government employees and pensioners eligible for jury duty is valid.¹⁴⁰ The Court announced that it would have reached the same conclusion even if such persons had not been eligible jurors at common law. The defendant can still challenge individual government employees for actual bias.

¹³⁵ 18 U.S.C. § 4244 (1958).

¹³⁶ *Greenwood v. United States*, 350 U.S. 366 (1956), 7 HASTINGS L.J. 202, 41 IOWA L. REV. 303, 55 MICH. L. REV. 127.

¹³⁷ U.S. CONST. art. I, § 8.

¹³⁸ *Reynolds v. United States*, 98 U.S. 145, 154 (1878).

The author plans to deal more fully with the right to an impartial jury when he writes about rule twenty-four, which is more closely connected with the subject than rule twenty-three.

¹³⁹ See 60 COLUM. L. REV. 349 (1960); Scott, *The Supreme Court's Control on State and Federal Criminal Juries*, 34 IOWA L. REV. 577, 599 (1949).

¹⁴⁰ *United States v. Wood*, 299 U.S. 123, 134, 141 (1936) (three Justices dissenting), 6 BROOKLYN L. REV. 388 (1937), 50 HARV. L. REV. 692 (1937), 25 ILL. B.J. 333 (1937), 21 MINN. L. REV. 608 (1937), 11 TEMP. L.Q. 430 (1937). For the case below see 83 F.2d 587, 589 (D.C. Cir. 1936) (one judge dissenting).

The Court previously held that government employees were ineligible for jury service. *Crawford v. United States*, 212 U.S. 183, 195 (1909). There was then no act of Congress providing for such service.

The Supreme Court has stated by Mr. Justice Shiras: "The right of challenge comes from common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury."¹⁴¹ Later, however, the Court held that the Constitution did not require Congress to grant peremptory challenges in criminal cases, hence a statute requiring that the several defendants in a single trial be treated as a single party in determining the number of allowable challenges did not violate the Constitution.¹⁴²

The right to an impartial trial does not require that the jury contain members belonging to a particular group to which a defendant belongs; it has been held that a socialist is not denied his constitutional right because the jury was composed of members of other political groups and of property owners.¹⁴³

While aliens are protected by the sixth amendment, the ancient rule under which an alien may have a trial by jury, "one half denizens and the other aliens," in order to insure impartiality, no longer obtains.¹⁴⁴ The sixth amendment does not preclude legislation making women qualified to serve as jurors, although this was not permitted at common law.¹⁴⁵

M. Presence and Assistance of Judge

Trial by jury necessarily involves the presence and assistance of a judge. As Mr. Justice Gray has stated: "[Trial by jury] is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."¹⁴⁶

The right to trial by jury does not mean that there may not be substitution of judges during the criminal proceeding.¹⁴⁷ The de-

¹⁴¹ *Lewis v. United States*, 146 U.S. 370, 376 (1892).

¹⁴² *Stilson v. United States*, 250 U.S. 583, 586 (1919), *affirming* *United States v. Stilson*, 254 Fed. 120, 121 (E.D. Pa. 1918).

¹⁴³ *Ruthenberg v. United States*, 245 U.S. 480 (1918).

¹⁴⁴ *United States v. Wood*, 299 U.S. 123, 145 (1936). This ancient rule was followed in *United States v. Cartacho*, 25 Fed. Cas. 312 (No. 14738) (C.C.D. Va. 1823).

¹⁴⁵ *United States v. Wood*, 299 U.S. 123, 145 (1936); *Hoxie v. United States*, 15 F.2d 762 (9th Cir. 1926); *Tynan v. United States*, 297 Fed. 177, 178, 179 (9th Cir.), *cert. denied*, 266 U.S. 604 (1924). See *Hoyt v. State of Florida*, 368 U.S. 57, 61 (1961).

¹⁴⁶ *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899). This language is quoted favorably in *Patton v. United States*, 281 U.S. 276, 289 (1930).

¹⁴⁷ *Simons v. United States*, 119 F.2d 539, 544 (9th Cir.), *cert. denied*, 314 U.S.

fendant may waive the right to have the same judge throughout the trial, just as he can waive trial by jury.

N. Directed Verdict of Acquittal

In a proper case it is the duty of the trial court to direct an acquittal.¹⁴⁸ The trial court can grant a new trial for insufficiency of evidence, and can also direct an acquittal.¹⁴⁹ As a Court of Appeals has stated:

"The constitutional guaranty restrains the lay jury to the limited and special role of determining controverted issues of fact. Questions of law, methods of practice, and points of procedure are exclusively the province of the judge. . . . Although the limits of the constitutional maxim have varied from time to time, one important issue—the legal sufficiency of the evidence—required judicial attention from the start. Ordinarily, the judge exercised the power to pass on this legal question during the trial."¹⁵⁰

O. No Directed Verdict of Guilty

It has been repeatedly held that for the court to direct a verdict of guilty is a violation of the right to trial by jury.¹⁵¹ However, one

616 (1941), 21 NEB. L. REV. 171. See Note, 52 MICH. L. REV. 911, 912 n.5 (1954); Note, 29 N.Y.U.L. REV. 1019 (1954). For an earlier contrary case, see *Freeman v. United States*, 227 Fed. 732, 759 (2d Cir. 1915), criticized by Calvert Magruder in 29 HARV. L. REV. 83 (1915).

¹⁴⁸ *United States v. Fullerton*, 25 Fed. Cas. 1225 (No. 15176) (S.D.N.Y. 1870); *United States v. Babcock*, 24 Fed. Cas. 912 (No. 14486) (C.C.E.D. Mo. 1876); *United States v. Anthony*, 24 Fed. Cas. 829, 832 (No. 14459) (C.C.N.D.N.Y. 1873).

¹⁴⁹ *France v. United States*, 164 U.S. 676, 681 (1897); *McGuire v. United States*, 152 F.2d 577, 580 (8th Cir. 1945); *Ex parte United States*, 101 F.2d 870, 874 (7th Cir. 1939). The court may even grant a directed verdict on the opening statement of counsel. *Cady v. United States*, 293 Fed. 829, 830 (D.C. Cir. 1923); *Nosowitz v. United States*, 282 Fed. 575, 578 (2d Cir. 1922); *Isbell v. United States*, 227 Fed. 788, 790 (8th Cir. 1915); *Union Pacific Coal Co. v. United States*, 173 Fed. 737, 740 (8th Cir. 1909); *Vernon v. United States*, 146 Fed. 121, 123 (8th Cir. 1906); *United States v. Kuhl*, 85 Fed. 624, 625 (D.C.S.D. Iowa 1898).

¹⁵⁰ *Ex parte United States*, 101 F.2d 870, 874-75 (7th Cir. 1939). The court held that not only may a directed verdict of acquittal be given, but also a judgment n.o.v. Neither interferes with the constitutional powers of the jury. The Supreme Court affirmed in an evenly divided decision. *United States v. Stone*, 308 U.S. 519 (1939).

¹⁵¹ *Patton v. United States*, 281 U.S. 276, 289 (1930); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899); *Sparf and Hansen v. United States*, 156 U.S. 51, 105 (1895); *Dinger v. United States*, 28 F.2d 548, 551 (8th Cir. 1928); *Blair v. United States*, 241 Fed. 217, 230 (9th Cir. 1917); *Cummins v. United States*, 232 Fed. 844, 846 (8th Cir. 1916); *Atchison, T. & S.F. Ry. v. United States*, 172 Fed. 194, 195 (7th Cir. 1909); *Konda v. United States*, 166 Fed. 91, 93 (7th Cir. 1908);

case held that a judge may direct a verdict of guilty.¹⁵² Later the Supreme Court seemed to move in the direction of holding that an instruction correctly stating the law and warning the jury against a finding contrary to it is not a direction of a verdict of guilty even though, in effect, it tells the jury to find the defendant guilty.¹⁵³ Subsequently the Supreme Court concluded that "a judge may not direct a verdict of guilty no matter how conclusive the evidence."¹⁵⁴

P. Statutory Presumptions

Congress may create statutory presumptions without infringing the right of trial by jury.¹⁵⁵ There have been a number of state court decisions intimating that some statutory presumptions violate the right to jury trial.¹⁵⁶ But if the presumption creates merely a permissible inference, it is not reasonable to conclude that the judge's instruction that they may convict is an invasion of the jury's function.¹⁵⁷ In fact, the jury can always ignore the statutory presumption and acquit.

Q. Instructions as to the Law

The jury is bound to follow the judge's instructions on matters of law since it has no legal right as a matter of constitutional law or statutory or decisional law to ignore such instructions.¹⁵⁸ This is true when:

Breese v. United States, 108 Fed. 804 (4th Cir. 1901) (one judge dissenting); *United States v. Taylor*, 11 Fed. 470, 473 (D. Kan. 1882); *United States v. Greathouse*, 26 Fed. Cas. 18, 21 (No. 15254) (C.C.N.D. Cal. 1863); *United States v. Fenwick*, 25 Fed. Cas. 1065 (No. 15087) (C.C.D. 1839); *United States v. Wilson*, 28 Fed. Cas. 699, 708 (No. 16730) (C.C.E.D. Pa. 1830); *United States v. Hodges*, 26 Fed. Cas. 332, 334 (No. 15374) (C.C.D. Md. 1815); *Masters v. United States*, 42 App. D.C. 350, 353 (D.C. Cir. 1914) (one judge dissenting); *Territory v. Kee*, 15 N.M. 510, 25 Pac. 924, 926 (1891).

¹⁵² *United States v. Anthony*, 24 Fed. Cas. 829, 833 (No. 14459) (C.C.N.D.N.Y. 1873). See also *Seiden v. United States*, 16 F.2d 197 (2d Cir. 1926), 11 MINN. L. REV. 663; *In re Wiltbank*, 30 Fed. Cas. 257 (No. 17855) (D.C.E.D. Pa. 1876).

¹⁵³ *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (four Justices dissenting), approved in 19 MICH. L. REV. 325, 30 YALE L.J. 421, criticized in 21 COLUM. L. REV. 190, 5 MINN. L. REV. 231. For the case below see 48 App. D.C. 380 (D.C. Cir. 1919), which also upheld the conviction.

¹⁵⁴ *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 408 (1947). *Accord*, *Fleischman v. United States*, 174 F.2d 519, 520 (D.C. Cir. 1949); *United States v. Gollin*, 166 F.2d 123, 127 (3d Cir.), *cert. denied*, 333 U.S. 875 (1947).

¹⁵⁵ See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). *United States v. Yee Fing*, 222 Fed. 154 (D. Mont. 1915).

¹⁵⁶ *Brosman, The Statutory Presumption*, 5 TUL. L. REV. 178, 180 n.126 (1931); 55 COLUM. L. REV. 527, 530 (1955); 38 MICH. L. REV. 366, 369 (1940).

¹⁵⁷ *McCORMICK, EVIDENCE* § 313, at 662 (1954).

¹⁵⁸ *Horning v. District of Columbia*, 254 U.S. 135, 139 (1920); *Sparf & Hansen v. United States*, 156 U.S. 51 (1895).

the jury convicts. But when it acquits on a general verdict, the defendant could plead double jeopardy if later prosecuted, for at the date of the adoption of the Constitution and the sixth amendment it appeared that the jury had the right to ignore the court's instructions.¹⁵⁹

R. Comment on the Facts

While the federal trial judge may sum up the facts to the jury and may express an opinion on the facts, there "is a constitutional line across which he cannot go."¹⁶⁰ [He]

should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. . . . As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to.¹⁶¹

S. Unanimous Verdict

The right to a jury trial includes the right to a unanimous verdict.¹⁶² This right extends to all issues presented to the jury, including the character or degree of the crime, guilt and punishment.¹⁶³ A Court of Appeals has held that the right cannot be waived.¹⁶⁴ Hence a majority verdict of conviction would be set aside even though the jury voted in favor of conviction by nine-to-three on the first count and ten-to-two on the second count. In that case, the waiver agreement had been made after only twenty-seven minutes of deliberation by the jury, which had reported its inability to agree. Thus, the reasonable doubt rule was violated.

¹⁵⁹ Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

¹⁶⁰ *Billeci v. United States*, 184 F.2d 394, 402 (D.C. Cir. 1950). The court cited many cases. See Note, 52 HARV. L. REV. 698 (1939).

¹⁶¹ *Starr v. United States*, 153 U.S. 614, 625 (1894). See Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1291 (1952).

¹⁶² *Patton v. United States*, 281 U.S. 276, 288-89 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900).

¹⁶³ *Andres v. United States*, 333 U.S. 740, 748 (1948), 51 W. VA. L. REV. 193 (1949). See also *Smith v. United States*, 47 F.2d 518, 519-20 (9th Cir. 1931) (one judge dissenting).

¹⁶⁴ *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953). This view is criticized in 6 ALA. L. REV. 332 (1954); 67 HARV. L. REV. 897 (1954); 52 MICH. L. REV. 911 (1954); 29 N.Y.U.L. REV. 1019 (1954); 1 U.C.L.A.L. REV. 106 (1953); 21 U. CHI. L. REV. 438, 447 (1954); 1954 WASH. U.L.Q. 235.

In two federal civil cases the Supreme Court stated that unanimity was an essential feature of trial by jury at common law and this right was secured by the seventh amendment.¹⁶⁵ However, rule forty-eight of the Federal Rules of Civil Procedure provides that the parties in a civil action may stipulate before or during trial for a majority verdict. The Supreme Court has stated by way of dictum that majority verdicts in state courts do not violate due process.¹⁶⁶

T. New Trial and Appeal

There is no constitutional objection to granting a new trial after conviction of a defendant by a jury,¹⁶⁷ even though in the eighteenth century motions for new trial were not made in felony cases.¹⁶⁸ Just as the defendant can move for new trial after conviction, so he can take an appeal.¹⁶⁹ This does not violate the right to trial by jury despite occasional statements to the contrary.¹⁷⁰ However, under the doctrine of double jeopardy, the Government may not appeal from a conviction.¹⁷¹

II

THE CONSTITUTIONALITY OF JURY TRIAL WAIVER

Since the Judiciary Act of 1789, federal statutes have provided that "the trial of issues of fact . . . in all causes except cases in equity

¹⁶⁵ *Springville v. Thomas*, 166 U.S. 707, 708 (1897); *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

¹⁶⁶ *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). See also *Maxwell v. Dow*, 176 U.S. 581, 605 (1900).

¹⁶⁷ *Patton v. United States*, 281 U.S. 276, 289 (1930); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899); *United States v. Plumer*, 27 Fed. Cas. 551, 572 (No. 16055) (C.C.D. Mass. 1859); *United States v. Harding*, 26 Fed. Cas. 131, 136, 137 (No. 15301) (C.C.E.D. Pa. 1846); *United States v. Keen*, 26 Fed. Cas. 686 (No. 15510) (C.C.E.D. Ind. 1834); *United States v. Haskell*, 26 Fed. Cas. 207, 211 (No. 15321) (C.C.E.D. Pa. 1823); *United States v. Fries*, 9 Fed. Cas. 826, 821 (No. 5126) (C.C.D. Pa. 1799).

A single case denied that there can be a new trial after conviction in capital cases. *United States v. Giffert*, 25 Fed. Cas. 1287, 1296 (No. 15204) (C.C.D. Mass. 1834).

¹⁶⁸ *Ex parte United States*, 101 F.2d 870, 877 (7th Cir. 1939).

¹⁶⁹ ORFIELD, *CRIMINAL APPEALS IN AMERICA*, 243-58 (1939); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 195-201 (1960). See *State v. Knight*, 96 N.J.L. 461, 115 Atl. 569 (Ct. Err. & App. 1921).

¹⁷⁰ See authorities cited in ORFIELD, *op. cit. supra* note 169, at 45-56, 87 (1939).

¹⁷¹ *Kepner v. United States*, 195 U.S. 100 (1904) (Three justices dissenting). See Mayers & Yarbrough, "*Bis Vexari*": *New Trials and Successive Prosecution*, 74 HARV. L. REV. 1, 8-15 (1960).

and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding[s] in bankruptcy, shall be by jury"¹⁷² in the federal district courts.

In 1865, a statute was passed authorizing waiver in civil cases.¹⁷³ Although previously the Supreme Court had held that there could be no waiver in civil cases,¹⁷⁴ the court upheld the validity of the waiver statute.¹⁷⁵ In 1870, a statute¹⁷⁶ creating a police court for the District of Columbia with jurisdiction over misdemeanors provided that all trials in this court should be by the judge alone, but that a trial de novo might be had by an appeal to the Supreme Court, the principal trial court of the District. This statute was held unconstitutional.¹⁷⁷ It was then superseded by a statute authorizing the defendant, in any case tried in the court, to waive a jury.¹⁷⁸ Apparently there were no such statutes for the regular federal courts, though a number of territorial legislatures such as Washington, Kansas, and Utah had passed such statutes.¹⁷⁹

An early federal case decided by Mr. Justice Story, sitting as a circuit justice, did not admit the possibility of waiver of jury trial.¹⁸⁰ The case assumed that trial by jury was the only mode of trial. Even though by state law the final step in arraignment was the question as to how the defendant might be tried, state law did not apply to a federal criminal proceeding. The ancient choice in England between trial by jury and trial by battle was gone. "Now in America, the trial by battle was never introduced at all; and the only trial since the first settlement

¹⁷² 28 U.S.C. § 770 (1928). See Act of Sept. 24, 1789, ch. 20, §§ 9, 12, 1 Stat. 73. See Grant, *Our Common Law Constitution*, 40 B.U.L. REV. 1, 8-15 (1960).

¹⁷³ Act of March 3, 1865, ch. 87, § 4, 13 Stat. 501. Prior federal statutes had authorized waiver in the federal courts for Louisiana, Oregon, and California. Act of May 26, 1823, ch. 131, 4 Stat. 62; Act of Feb. 19, 1864, ch. 11, 13 Stat. 4.

¹⁷⁴ *Kearney v. Case*, 79 U.S. 275 (1870).

¹⁷⁵ *Campbell v. Boyreau*, 62 U.S. 223, 226 (1858).

¹⁷⁶ Act of June 17, 1870, ch. 83, 16 Stat. 153.

¹⁷⁷ *Callan v. Wilson*, 127 U.S. 540 (1888). See text accompanying nn. 20 & 21 *supra*.

¹⁷⁸ Act of July 23, 1892, ch. 236, 27 Stat. 261.

¹⁷⁹ See Grant, *Waiver of Jury in Felony Cases*, 20 CALIF. L. REV. 132, 148 n.113 (1932).

¹⁸⁰ *United States v. Gilbert*, 25 Fed. Cas. 1287, 1303-06 (No. 15204) (C.C.D. Mass. 1834). This case was cited by Mr. Justice Harlan in *Schick v. United States* in his dissenting opinion, 195 U.S. 65, 72, 79 (1904). See Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934). There were many cases of waiver in the colonies. *Id.* at 660-69.

of the country has always, in criminal cases, been by a jury; and could not be in any other manner." The constitutional provision "that the trial of all crimes except in cases of impeachment shall be by jury" is "imperative upon the courts, and prisoners can be lawfully tried in no other manner. As soon, therefore, as it judicially appears of record that a party has pleaded not guilty, there is an issue in a criminal case, which the courts are bound to direct to be tried by a jury."¹⁸¹ The Crimes Act of 1790¹⁸² and the Act of March 3, 1825,¹⁸³ contemplated that upon a plea of not guilty the defendant would be tried by a jury. Circuit Justice Story put this query: "Suppose they had answered that they wished to be tried by the court, could the court have tried the cause otherwise than by jury? Suppose they had been silent as to how, and when, and whether, they should be tried, could the court have done otherwise than order a trial by jury?" He concluded: "The constitution decides how he shall be tried, independent of any election on his part. The plea of not guilty puts the party for all purposes upon his trial by jury."¹⁸⁴

During the next forty-seven years no federal cases referred to the problem of waiver. In 1881 a territorial court held that in a capital case there could not be a jury of eleven following illness of one juror.¹⁸⁵ The court cited several state court cases setting aside verdicts by thirteen jurors;¹⁸⁶ the court concluded that a jury of eleven was no more proper than one of thirteen.

In an 1882 case holding that a directed verdict of guilty violated the right to trial by jury the court stated: "This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous."¹⁸⁷ The

¹⁸¹ 25 Fed. Cas. at 1305.

¹⁸² Ch. 9, § 30, 1 Stat. 119 (1790).

¹⁸³ Ch. 65, § 14, 4 Stat. 118 (1825).

¹⁸⁴ 25 Fed. Cas. at 1306.

¹⁸⁵ *Territory v. Ah Wah*, 4 Mont. 149, 1 Pac. 732 (1881). The court cited several state court decisions, but no federal cases.

¹⁸⁶ Verdicts were set aside when it was discovered that thirteen jurors had rendered a verdict in *Bullard v. State*, 38 Tex. 504 (1873) and *State v. Hudkins*, 35 W. Va. 247, 13 S.E. 367 (1891). In the latter case it was held that even if the defendant could waive, the record must show a clear and affirmative waiver.

¹⁸⁷ *United States v. Taylor*, 11 Fed. 470, 471 (C.C.D. Kan. 1882). Mr. Justice Miller was consulted by the court and concurred in its view. The case was cited by Mr. Justice Harlan in his dissent in *Schick v. United States*, 195 U.S. 65, 72, 92 (1904). See also *Atchison, T. & S.F. Ry. v. United States*, 172 Fed. 194, 195 (7th Cir. 1909).

same year another court intimated that a statute providing for trial by the court of petty offenses committed on the high seas violated the right to trial by jury. Said the court:

The district judges who have sat here since the law was first passed in June, 1864, have had very grave doubts of the constitutionality of that part of section 4301 which provides for trial by the court; and it has been usual to try all contested cases by jury. It has been considered that the law is valid, excepting as to the mode of trial, and up to this time no question has been made about it. For the reason already given the question is not before me, and I shall content myself with saying that I share the doubt whether the legislature can require the court to try the main issue of facts in a criminal case.¹⁸⁸

The act of Congress¹⁸⁹ providing for trial by jury of an indicted person after a plea of not guilty should be liberally construed to apply to persons arraigned upon information or complaint.¹⁹⁰

In 1889 a circuit court, in holding that the right to a grand jury indictment cannot be waived, seemed to imply that the same was true of the right to jury trial.¹⁹¹

In 1892 a court stated: "It is claimed, and perhaps it is true, that a majority of states have held that a jury trial might be waived. We believe that the Supreme Court of the United States has not passed on this question."¹⁹² In the same year the Supreme Court held that a state statute permitting waiver of jury trial in criminal cases did not violate due process under the fourteenth amendment.¹⁹³ This was so even as to murder where the punishment was death. The Court pointed out that several states, such as Ohio, California, Connecticut, New Hampshire and New Jersey, had statutes permitting waiver which had been upheld in the state appellate courts. The decision was in a sense a narrow one, because the New Jersey statute provided that on a guilty plea in murder cases the court shall proceed to determine the degree of the crime and give sentence accordingly.

¹⁸⁸ *In re Smith*, 13 Fed. 25, 26 (C.C.D. Mass. 1882). See also *United States v. Smith*, 17 Fed. 510, 512 (C.C.D. Mass. 1883).

¹⁸⁹ REV. STAT. § 1032 (1875).

¹⁹⁰ *In re Smith*, 13 Fed. 25, 26 (C.C.D. Mass. 1882).

¹⁹¹ *Ex parte McClusky*, 40 Fed. 71, 75 (C.C.D. Ark. 1889).

¹⁹² *United States v. Jackson*, 20 D.C.S.C. Rep. 424, 427 (1892).

¹⁹³ *Hallinger v. Davis*, 146 U.S. 315 (1892). This is said to be the first authoritative statement construing constitutional objections to waiver of jury trial in state criminal cases, in Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 149 (1932).

In 1893 a district court stated that one charged with a misdemeanor may by consent waive a full jury. However, the discharge of a juror by consent of counsel in the absence of the defendant, of which he was not informed and which he failed to notice at the trial until the polling of the jury after the verdict, was not a valid waiver; he was entitled to a new trial. The court admitted that where the punishment might be death, the common law would not allow trial by less than twelve. Waiver of less than twelve could not be made by defendant's counsel in his absence if the defendant does not consent thereto or subsequently ratify the waiver.¹⁹⁴

In 1895 in a habeas corpus proceeding the Supreme Court declined to release a prisoner convicted under the Act of July 23, 1892,¹⁹⁵ authorizing waiver of trial by jury in police court cases in the District of Columbia.¹⁹⁶ However, at that date the Supreme Court had no appellate jurisdiction over the judgments of the Supreme Court of the District of Columbia in criminal cases or on habeas corpus. The Court of Appeals had previously upheld waiver under the statute,¹⁹⁷ implying that under certain circumstances the defendant could withdraw his waiver.¹⁹⁸ In 1895 the Supreme Court of New Mexico Territory held that a conviction by a jury of eleven must be set aside on the ground that waiver in felony cases was not permissible.¹⁹⁹

The right to a jury is a right to a jury of twelve. The Supreme Court has explained through Mr. Justice Harlan that "the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. . . . This question must be answered in the affirmative."²⁰⁰ There is no doctrine of implied waiver

¹⁹⁴ *United States v. Shaw*, 59 Fed. 110, 113 (D. Ky. 1893). For discussion of federal practice permitting waiver see Grant, *Felony Trials Without a Jury*, 25 AM. POL. SCI. REV. 980, 985-86 (1931).

¹⁹⁵ An Act to define the jurisdiction of the police court of the District of Columbia, 536, §§ 1-8, 26 Stat. 848 (1891); as amended, 236, § 2, 27 Stat. 261 (1892).

¹⁹⁶ *In re Belt*, 159 U.S. 95, 99 (1895).

¹⁹⁷ *Belt v. United States*, 4 App. D.C. 25, 32 (1894). But the court stated that there could be no waiver in the absence of express statutory provision for waiver.

¹⁹⁸ *Id.* at 36 (1894).

¹⁹⁹ *Territory v. Ortiz*, 8 N.M. 154, 42 Pac. 87 (1895), approved 9 HARV. L. REV. 353 (1895).

²⁰⁰ *Thompson v. Utah*, 170 U.S. 343, 349 (1898). See also *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Dickinson v. United States*, 159 Fed. 801, 806 (1st Cir. 1908).

where the defendant fails to object until after verdict.²⁰¹ Trial of misdemeanors by a jury of six under the Code of the Territory of Alaska was held to be unconstitutional.²⁰²

In a case arising in the Territory of Oklahoma, during the course of a murder trial a juror, contrary to his statement on voir dire, was disqualified because he had been convicted of a felony in Nebraska. The defendant had an opportunity to have him excused and the trial begun anew but his counsel refrained from making any objection at that time. The Supreme Court, speaking through Mr. Justice Holmes, held that it was too late for him to complain after the verdict of guilty had been rendered. Mr. Justice Holmes stated: "It now is argued that the defendant was deprived of a constitutional right, which he could not waive. . . . The contrary plainly is the law as well for the Territories as for the States."²⁰³ Subsequently the Supreme Court of the Territory of Oklahoma held that a crime triable at common law by a jury must be tried by a jury and there could be no waiver, pointing out that there was no statute permitting waiver involved.²⁰⁴

In 1904 the Supreme Court held that a written waiver of jury trial where the United States sued for a penalty of fifty dollars was valid.²⁰⁵ The decision was not a radical one, as the case involved merely a petty offense not requiring trial by jury.²⁰⁶ The Court observed that no act of Congress required trial by jury for petty offenses.²⁰⁷ Since the defendant could plead guilty and thus dispense with trial by jury, it was reasoned that he should be able to waive such trial.²⁰⁸ Similarly, since the defendant could waive his right to confrontation of witnesses and to assistance of counsel, he should be able to waive jury trial. Mr. Justice Harlan in his dissent stated that he and the whole Court agreed

²⁰¹ *Patton v. United States*, 281 U.S. 276, 293 (1930); *Diaz v. United States*, 223 U.S. 442, 459 (1912); *Thompson v. Utah*, 170 U.S. 343, 349 (1898).

²⁰² *Rasmussen v. United States*, 197 U.S. 516 (1905).

²⁰³ *Queenan v. Oklahoma*, 190 U.S. 548, 551 (1903). The same was held as to an alien juror in a state murder case. *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895). Alienage, infancy, infamy and affinity are in the same category. *Raub v. Carpenter*, 187 U.S. 159, 164 (1902); *Hollingsworth v. Duane*, 12 Fed. Cas. 370, 371, 376 (No. 6618) (C.C.E.D. Pa. 1801).

²⁰⁴ *In re McQuown*, 19 Okla. 347, 91 Pac. 689 (1907).

²⁰⁵ *Shick v. United States*, 195 U.S. 65, 67 (1904), 5 COLUM. L. REV. 48 (1905). An annotation in 1 Ann. Cas. 597-98 (1904) indicated that the weight of authority in the state courts was perhaps against waiver, at least in the absence of statutory authority.

²⁰⁶ *Schick v. United States*, 195 U.S. 65, 68 (1904).

²⁰⁷ *Id.* at 70-71.

²⁰⁸ *Id.* at 71. See text accompanying n.96 *supra*.

that there could be no waiver in felony cases.²⁰⁹ A district court followed this decision in 1907.²¹⁰

In 1908 a Court of Appeals held that a person accused of an infamous crime, though not a felony, could not waive his right to a jury of twelve by consenting after a jury of twelve had been impaneled and two had been excused; to continue the trial and abide by a verdict of the remaining ten.²¹¹ One juror had become ill, and another was excused because of a death in his family. The court stated that no distinction had ever been made and that the court would not distinguish between a case where the full jury is first impaneled and jurors are subsequently withdrawn with consent, and where the jury was from the beginning less than twelve with consent.²¹² The court pointed out that historically in England there could be no waiver in felony cases, but that this was not true as to misdemeanors. The court intimated that the state practice where the federal court sat might have some weight.²¹³ The dissent thought that while there could be no waiver in capital cases, there could be as to misdemeanors and even as to felonies, and that no distinction should be taken between felonies and misdemeanors, or between different kinds of felonies, or between different kinds of misdemeanors. The sound discretion of the trial court should be the test.²¹⁴ Waiver should be on consent of the court, upon request of the defendant under advice of counsel, and with the approval of the Government.²¹⁵ It would be oppressive to a defendant charged with a misdemeanor not to let him waive during a trial.²¹⁶

In 1909 a Court of Appeals stated by way of dictum in a civil case that trial by a judge is a "void proceeding, for the Constitution of the United States declares that all such cases shall be tried by a jury."²¹⁷

²⁰⁹ *Id.* at 72, 95.

²¹⁰ *United States v. Praeger*, 149 Fed. 474, 478 (W.D. Tex. 1907). Waiver was by a written stipulation.

²¹¹ *Dickinson v. United States*, 159 Fed. 801, 804 (1st Cir. 1908) (one judge dissenting), *cert. denied*, 213 U.S. 92 (1909). The court stated that a defendant may waive the disqualification of jurors or even their impartiality. *Id.* at 809. Prosecution was for conversion by the cashier of a national bank, a misdemeanor. The case was noted approvingly in 8 COLUM. L. REV. 577 (1908).

²¹² *Id.* at 805. But see *Id.* at 812, 819, 823 (dissenting opinion), citing *Commonwealth v. Dailey*, 12 Cush. 80 (Mass. 1853).

²¹³ *Id.* at 809.

²¹⁴ *Id.* at 812, 818.

²¹⁵ *Id.* at 821.

²¹⁶ *Id.* at 823-24.

²¹⁷ *United States v. Louisville & N. Ry.*, 167 Fed. 306, 308 (6th Cir. 1909). The action was for a penalty which the court regarded as a civil action.

The same year the same court held that there could be no waiver by agreement of the defendant and the United States attorney as to "crimes" under the sixth amendment. The word "crime" did not necessarily mean an "infamous" offense, but it included every offense of a serious or atrocious character and allowing infliction of long terms of imprisonment. Circuit Judge Lurton, later a Supreme Court Justice, stated that no statute provided for trial by the district court without a jury "except in case of equity and maritime jurisdiction, or when so provided by the bankrupt law."²¹⁸ Hence, both in criminal and in ordinary civil actions there must be a jury. Where an offense might be punished by a term of two years in prison and a fine of \$5,000, there must be a jury, the sixth amendment not modifying article three so as to allow jury waiver. The public as well as the defendant was concerned. Consequently, a court sitting without a jury could not have jurisdiction to pronounce sentence after a finding of guilty.

In 1910 it was held in a Hawaiian case that there could be waiver in misdemeanor cases as to a jury of twelve.²¹⁹ A statute allowed such waiver. In 1911 a Court of Appeals held that, where the crime is not a petty offense, there can be no waiver of jury trial.²²⁰ If tried by the court, the judgment would be a nullity and subject to reversal. The federal statutes provided in general for trial by jury, and there was no statute allowing waiver of jury in the district court.

In 1913 a Court of Appeals, while assuming that there could be no waiver of jury trial in the absence of statutory provision, held that where the defendant's demurrer is overruled and he then fails to plead, there remains no issue for jury trial; and the court may render judgment against him.²²¹ However, in a case involving substitution of a judge, the Court of Appeals for the Second Circuit stated by way of dictum that trial by jury may not be waived.²²² Furthermore, twelve jurors must sit throughout the trial.

The sixth amendment is not violated where a defendant is tried by the same jury which had been dismissed after a demurrer to the in-

²¹⁸ *Low v. United States*, 169 Fed. 86, 88 (6th Cir. 1909).

²¹⁹ *Territory v. Soga*, 20 Hawaii 71 (1910). See 70 A.L.R. 291 (1931), summarizing the case. Trial was before eleven jurors.

²²⁰ *Frank v. United States*, 192 Fed. 864, 867 (6th Cir. 1911).

²²¹ *Summers v. United States*, 204 Fed. 976, 978 (9th Cir. 1913).

²²² *Freeman v. United States*, 227 Fed. 732, 749-51 (2d Cir. 1915). This part of the case was approved in a note in 29 HARV. L. REV. 83 (1915) by Calvert Magruder, later Chief Judge of the Court of Appeals for the First Circuit.

dictment had been overruled. The failure to impanel a new jury after the subsequent plea of not guilty did not deprive the defendant of his right to trial by jury.²²³

In 1916 an Alaskan case permitted waiver in misdemeanor cases.²²⁴ An earlier Alaskan case,²²⁵ holding against waiver, was rejected even though it had been decided shortly before.

In 1917 the Court of Appeals for the Ninth Circuit in holding against a directed verdict of guilty stated: "The constitutional right thus secured to one charged with crime means a jury according to the course of the common law, which right cannot even be waived."²²⁶ As late as 1923 a Court of Appeals held that there could be no waiver in a prosecution for violation of the National Prohibition Act, where the defendant was fined one thousand dollars and sentenced to twelve months imprisonment in jail.²²⁷

In one case, during a trial a juror became ill and a mistrial was declared. By consent of counsel for both parties, the trial was continued before the remaining eleven jurors and a new juror. The witnesses who had testified were recalled to testify that their former testimony was true, after which it was read to the new jury by the stenographer. It was held that this did not violate the rights to trial by jury or to confrontation of witnesses.²²⁸

In 1929 it was held that, while a defendant has a constitutional right to a jury of twelve which cannot be waived, the drawing, pursuant to state practice, of a thirteenth or alternate juror, who was discharged before the case was given to the jury, invaded no right of the defendant and was in no way prejudicial, even assuming that the defendants might have objected to such practice.²²⁹

Finally, in 1930 the Supreme Court held in *Patton v. United States*²³⁰ that a defendant may waive his right to trial by jury even in

²²³ *Lovato v. New Mexico*, 242 U.S. 199, 201 (1916). See also *United States v. Riley*, 27 Fed. Cas. 810, 811 (No. 16164) (C.C.S.D.N.Y. 1864).

²²⁴ *Ex parte Dunlap*, 5 Alaska 521, 525 (1916).

²²⁵ *In re Virch*, 5 Alaska 500 (1916).

²²⁶ *Blair v. United States*, 241 Fed. 217, 230 (9th Cir. 1917).

²²⁷ *Coates v. United States*, 290 Fed. 134, 136 (4th Cir. 1923). In the same year a court saw no objection to waiver of jury trial as to a plea of double jeopardy. *United States v. Weiss*, 293 Fed. 992, 994 (N.D. Ill. 1923).

²²⁸ *Grove v. United States*, 3 F.2d 965 (4th Cir.), *cert. denied*, 268 U.S. 691 (1925). One judge dissented and denied that trial by jury could be waived.

²²⁹ *Gibson v. United States*, 31 F.2d 19, 21 (9th Cir. 1929).

²³⁰ 281 U.S. 276 (1930), 10 B.U.L. REV. 546, 18 CALIF. L. REV. 702, 30 COLUM. L. REV. 1063, 35 DICK. L. REV. 23, 44 HARV. L. REV. 124, 24 ILL. L. REV.

felony cases either by dispensing with a jury altogether or by consenting to trial by a jury of less than twelve. In this particular case, trial was by eleven jurors.²³¹ The Constitution merely confers on a defendant a privilege for his own protection. No valid considerations of public policy stand in the way of denying waiver. However, the Court stated that consent of the prosecuting attorney and approval of the court were required in addition to demand by the defendant. A court sitting alone has jurisdiction under statute²³² to try the facts in a criminal case if a jury is waived. Civil cases had indicated that a district court has power to try cases without a jury.²³³ It made no difference that there was no federal statute expressly authorizing waiver.

Even though the Court upheld waiver of trial by jury in the *Patton* case, it concluded its opinion with a tribute to trial by jury:

Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable and undue departures from that mode of trial or from any of the essential elements

339, 28 MICH. L. REV. 1054, 15 MINN. L. REV. 109, 8 N.Y.U.L. REV. 144, 10 ORE. L. REV. 200, 16 ST. LOUIS L. REV. 78, 9 TEXAS L. REV. 90. See also 20 CALIF. L. REV. 132, 147, 156 (1932). For the case below see 30 F.2d 1015 (8th Cir. 1929).

²³¹ Some commentators thought that while waiver is proper as to a single juror, it does not follow that the whole jury can be waived. Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 152 (1932); 35 DICK. L. REV. 23 (1930); 44 HARV. L. REV. 124 (1930); 24 ILL. L. REV. 339 (1929); 16 ST. LOUIS L. REV. 78 (1930).

²³² The court referred to art. III, sec. 1 of the Constitution. Yet sections nine and twelve of the Judiciary Act had contained language making trial by jury mandatory. These provisions had been reenacted into the statutes of the time. 28 U.S.C. §§ 343, 770 (1928). See Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 153 (1932); 15 MINN. L. REV. 109 (1930).

²³³ *Kearney v. Case*, 79 U.S. (12 Wall.) 275, 281 (1870). But waiver in civil cases was authorized by express statutes. Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 148, 154 (1932).

thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.²³⁴

The next year a Court of Appeals stated that "there is no longer any question of the right to waive."²³⁵ Where a waiver is in writing, and signed by the defendant and there is no intimation or proof that the defendant did not fully understand and freely consent to it, the waiver is valid. In the absence of a contrary statute or a contrary intimation in the *Patton* case, waiver of jury, although preferably in writing and signed by the defendant personally, may be made orally.²³⁶ Moreover, counsel for defendant may orally waive in the presence of the defendant.²³⁷ The record in the federal district court must clearly show that the defendant's waiver was formally and legally obtained after full explanation and understanding of his rights, particularly where the waiver was given without advice of counsel of his selection.²³⁸ If the Government declines to join in the waiver, there can be no waiver and the trial court need not then consider whether it should consent thereto.²³⁹ Of course, the trial judge can make it clear that he agrees with the Government that there should be no waiver.²⁴⁰ The Government and the court show their consent to waiver when they agree to dismissal of the jurors. On habeas corpus proceedings, original interrogatories of the presiding judge, the United States attorney, and the deputy clerk of court, and a deposition of defense counsel may be introduced to show affirmatively that the prisoner waived his right to jury trial in open court and that his waiver was intelligently and deliberately made.²⁴¹

May a defendant, if sufficiently competent and intelligent, waive jury trial without advice of counsel? The Court of Appeals for the

²³⁴ *Patton v. United States*, 281 U.S. 276, 312-13 (1930).

²³⁵ *Ferracane v. United States*, 47 F.2d 677, 679 (7th Cir. 1931). See also *Spann v. Zerbst*, 99 F.2d 336 (5th Cir. 1938).

²³⁶ *Jabczyanski v. United States*, 53 F.2d 1014 (7th Cir. 1931); *Irvin v. Zerbst*, 97 F.2d 257 (5th Cir.), *cert. denied*, 303 U.S. 637 (1938). But an express waiver is required. There is no doctrine of implied waiver. *United States v. Shaw*, 33 F. Supp. 531, 533 (S.D. Calif. 1940).

²³⁷ *Irvin v. Zerbst*, 97 F.2d 257, 258 (5th Cir.), *cert. denied*, 303 U.S. 637 (1938).

²³⁸ *Dillingham v. United States*, 76 F.2d 36, 39 (5th Cir. 1935).

²³⁹ *United States v. Dubrin*, 93 F.2d 499, 505 (2d Cir. 1937). See also *C.I.T. Corporation v. United States*, 150 F.2d 85, 91 (9th Cir. 1945).

²⁴⁰ *Rees v. United States*, 95 Fed. 784, 790 (4th Cir. 1938).

²⁴¹ *Brown v. Zerbst*, 99 F.2d 745 (5th Cir. 1938), *cert. denied*, 305 U.S. 661 (1939).

Second Circuit held not.²⁴² The Supreme Court reversed,²⁴³ although no prior cases had required counsel for a waiver of trial by jury.²⁴⁴ Mr. Justice Douglas dissenting in an opinion joined by Justices Black and Murphy, thought that the *Patton* case did not allow waiver of an entire jury; but, assuming that it did, advice of counsel was necessary, since the defendant could not act intelligently without it. Mr. Justice Murphy, in a further opinion, objected to waiver of an entire jury, but said that, if it is allowed, it should be with the advice of counsel.

III

HISTORY OF DRAFTING RULE TWENTY-THREE

Rule 23 of the Federal Rules of Criminal Procedure entitled "Trial by Jury or by the Court," provides:

(a) TRIAL BY JURY. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) JURY OF LESS THAN TWELVE. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) TRIAL WITHOUT A JURY. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule thirty-eight of the first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, was modeled closely on Rule thirty-eight of the Federal Rules of Civil Procedure. Rule 38(a) provided that the right to a jury trial as declared by the Constitution or as given or recognized by a statute was to be preserved to the defendant and to the Government. Rule 38(b) provided for demand for jury trial in writing. Rule 38(c) provided for specification of the issues to be tried by jury. Rule 38(d) provided for waiver of jury trial through failure

²⁴² *United States ex rel McCann v. Adams*, 126 F.2d 774 (2d Cir. 1942), 55 HARV. L. REV. 1209, 41 MICH. L. REV. 495, 21 N.C.L. REV. 79, 91 U. PA. L. REV. 76, 28 VA. L. REV. 1005. The decision was two-to-one. The majority opinion was by Learned Hand, J.

²⁴³ *Adams v. United States ex rel McCann*, 317 U.S. 269, 275 (1942), 43 COLUM. L. REV. 135 (1943), 32 ILL. B.J. 213 (1944), 27 MINN. L. REV. 533 (1943), 16 SO. CALIF. L. REV. 240 (1943), 28 WASH. U.L.Q. 175 (1943). The defendant at one time had studied law, and had defended himself in a previous proceeding. See *Commonwealth v. Kruger*, 119 A.2d 870, 873 (Pa. Sup. Ct. 1956).

²⁴⁴ See *Dillingham v. United States*, 76 F.2d 36, 39 (5th Cir. 1935). But see the dissent in *Dickinson v. United States*, 159 Fed. 801, 812, 821 (1st Cir. 1908).

to serve a demand. Rule thirty-nine was modeled on Rule thirty-nine of the Federal Rules of Civil Procedure, providing for demand for jury trial. Rule forty-eight modeled in part on Rule forty-eight of the Federal Rules of Civil Procedure, provided: "The defendant or his attorney and the government may stipulate that the jury shall consist of any number less than twelve."

The Advisory Committee had before it a number of suggestions. The Committee for the Southern District of Florida suggested that the rule permit waiver of jury trial except in capital cases.²⁴⁵ The Committee for the District of Colorado would have allowed a waiver of jury trial in open court with the permission of the court and consent of the United States attorney, provided that the court first advised the defendant of his right to jury trial. In discussing at the Judicial Conference of the Second Circuit whether the rule should provide for waiver of jury trial, Judge Hincks of Connecticut raised the question whether, if this were done, the court should be required to make specific findings as in civil cases. The Committee for the Southern District of Florida suggested provision for verdicts by nine or more jurors on agreement of the parties and recital in the verdict of the number of concurring jurors. The Judicial Conference of the Fifth Circuit was practically unanimous that, after a jury of twelve had been impaneled, if one or more jurors should die or for any cause be entitled to be excused, the Government and the defendant might agree that a verdict be rendered by less than twelve. A considerable number of the judges opposed the initial empanelling of a jury less than twelve on the ground that "such action would be unconstitutional."

The second draft, dated January 12, 1942, was much narrower in scope and covered only waiver. Rule sixty, entitled "Waiver of Jury," provided: "A defendant in a case in which he has the constitutional privilege of trial by jury may waive jury trial and may consent to be tried by the court. The waiver may be made only with the approval of the court and of the government. A defendant who plans to waive a jury trial shall notify the court of such waiver at his earliest oppor-

²⁴⁵ The Judicial Conference of the Fifth Circuit saw no serious objection to this suggestion. Nathan April of New York, while favoring waiver, was opposed to constructive waiver. Alexander Campbell, United States attorney for Northern Indiana, thought that the defendant should be required to indicate in writing at the time of arraignment whether or not he wishes jury trial; if the defendant is without counsel and the court appoints counsel, he should be required within five days after appointment to indicate whether or not the defendant wishes a jury trial.

tunity preceding the date set for trial." The first two sentences continued the existing rule as laid down in the *Patton* case.²⁴⁶ The Advisory Committee favored continuance of the old rule, as did a number of letters received by the Committee. But the Committee for the Chicago Bar Association would allow waiver without the consent of the Government.

The third draft, dated March 4, 1942, deleted the last sentence of the second draft. Furthermore, it provided that the waiver must be in writing.

The fourth draft, dated May 18, 1942, was much closer to the final draft. Rule 25(a) provided: "Trial shall be by jury unless the defendant in writing with the approval of the court and the consent of the government waives a jury trial." Thus, there seemingly would be trial by jury even in very minor cases. Rule 25(b) provided: "Juries shall be of twelve but the parties may stipulate that the jury shall consist of any number less than twelve." Rule 25(c) was new. It provided: "In cases tried without a jury if the court finds the defendant guilty, he may in addition find the facts especially or file an opinion instead of such special findings."

The fifth draft, dated June 1942, was numbered rule twenty-six. It was entitled "Trial by Jury or by the Court," the final title. Previous titles had been simply "Trial by Jury." Otherwise the rule was the same as the fourth draft.

A preliminary draft, dated May 1942, similar to the fifth draft except as to title, was submitted to the Supreme Court for comment. The Court had two queries. First, assuming that a jury may be entirely waived or that any number less than twelve may sit if the parties consent, has the committee considered the policy of stipulation at the outset for a fixed number less than twelve? Secondly, should not subsection (c) require the judge trying a criminal case without a jury to find the facts specially, or to render an opinion stating the facts? But except for minor changes, the sixth draft was the same as the fifth draft.²⁴⁷

²⁴⁶ *Patton v. United States*, 281 U.S. 276 (1930), discussed in text accompanying n.230 *supra*.

²⁴⁷ The sixth draft was dated Winter 1942-43, and was numbered twenty-one. The word "twelve" in subsection (b) now became "12" in order to secure uniformity of style with the rest of the sixth draft and with the Federal Rules of Civil Procedure.

It was pointed out by the Reporter that the Supreme Court on Dec. 21, 1942, had held in *Adams v. United States ex rel. McCann*, 317 U.S. 269, (1942), that a

The first preliminary draft (seventh committee draft) was numbered rule 21(a) and provided: "Cases required to be tried by jury shall be so tried unless the defendant in writing with the approval of the court and the consent of the government waives a jury trial." Thus it resembled the present rule 23(a) except as to word order. Rule 21(b) and rule 21(c) made no changes from the sixth draft. The annotation to rule 21(c) pointed out that the Connecticut practice was similar.²⁴⁸

The following comments were made to the Advisory Committee on the rule as it appeared in the first preliminary draft. With respect to subdivision (a), some thought it undesirable to require the approval of the court and the consent of the Government for a waiver of jury trial. The Constitution ought not to be construed as guaranteeing trial by jury to the Government,²⁴⁹ for the right to such a trial is exclusively in the defendant. Moreover, the defendant may waive the right to counsel, to a speedy trial, to compulsory process, and to confrontation of witnesses. Since all these safeguards are enumerated in the same section of the Constitution as the right to jury trial, why require consent of the Government as to the latter and not as to the former? The approval of the court should not be required either. A judge can scarcely believe that a defendant would receive a fairer and less prejudicial trial from a jury than from himself; thus, it was argued that a judge withholding approval would do so only to avoid responsibility. Furthermore, when a defendant takes the stand, his prior criminal record may be brought out. This might prejudice the

defendant acting freely and intelligently and with the approval of the court and consent of the Government could waive his right to trial by jury after having waived the right to counsel.

The Reporter also pointed out that the Report to the Judicial Conference of Senior Circuit Judges of the United States, stating the findings and recommendations of the committee of district judges headed by Judge John C. Knox, supported the conclusions of the advisory committee.

²⁴⁸ *State v. Frost*, 105 Conn. 326, 135 Atl. 446 (1926); CONN. PRACTICE BOOK §§ 336-41 (1934) (Rules for the Supreme Court of Errors, 1930).

²⁴⁹ Mr. A. Jacobson of Waukesha, Wisconsin. Mr. William Scott Stewart of Chicago, Illinois, would have allowed the defendant to waive without approval of the court or consent of the Government. An Illinois statute requiring consent of the prosecutor was repealed after some experience under the statute. Mr. William Taft Feldman of Baltimore, Maryland, thought that requiring consent of the Government and approval of the court handicapped the defendant. 1 COMMENTS, RECOMMENDATIONS, AND SUGGESTIONS RECEIVED CONCERNING THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE 137, 437 (1943).

jury, but would not prejudice the judge. Therefore, where trial is by the court, defendant's counsel need hesitate less about putting the defendant on the stand. Moreover, where the crime had aroused the community, a jury might be less fair than a judge. It was pointed out that the absolute right of a defendant to waive jury trial had worked very well in the state courts of Maryland. However, Mr. Robert M. Hitchcock of Dunkirk, New York, thought that in capital cases trial should be by jury.²⁵⁰ Professor Robert Kingsley would have limited waiver to cases where the accused was represented by counsel and the counsel joined in the waiver. Consent to waiver should be expressed in open court, since obviously there is a psychological difference between waiver in a jail cell and waiver in a courtroom. Although the rule as written might permit waiver by counsel alone, preferably the defendant should actually approve the waiver.

With respect to subdivision (b) of the rule, Judge John C. Collet of the Western District of Missouri favored the rule because it would expedite trials. If only a small panel of jurors were available at the moment, proceedings could go forward if a smaller jury were permissible.²⁵¹ Judge Merrill C. Otis of the Western District of Missouri objected to the rule, feeling that a defendant was scarcely qualified to make a decision on the size of the jury. The mere request that a defendant consent to a jury of three, or five, or nine, would prejudice him if he did not consent. The Government would always be aided and would always agree to a smaller jury. Mr. George Philip of the Committee for the District of South Dakota thought the rule too loose. There should be an irreducible minimum of jurors, probably ten. That would allow for death, sickness or other circumstances justifying excuse from jury service. As then drawn, the rule would permit a jury of one. Mr. C. C. Graydon of Columbia, South Carolina, thought that in capital cases there should be twelve jurors, and that neither the defendant nor his counsel could waive.²⁵² Mr. Thomas V. Arrowsmith, Assistant United States Attorney for the District of New Jersey, thought that the procedure should not be invoked except in a trial where alternate jurors had not been drawn and where illness or other equally impelling cause made it impossible to bring the case to a verdict after a full jury had been sworn.²⁵³

²⁵⁰ 1 *Id.* at 138.

²⁵¹ 1 *Id.* at 139.

²⁵² 1 *Id.* at 140.

²⁵³ 2 *Id.* at 438.

With respect to subdivision (c) of the rule, there were comments that it did not mean very much.²⁵⁴ While it did not require the judge to make findings or file an opinion, he would be at liberty to do either or both without any rule. In addition, it was deemed unnecessary and burdensome to make findings in all cases where the defendant was found guilty, though such findings would be helpful to counsel on both sides and to the appellate court in cases in which an appeal was taken. An opinion should not be substituted for findings. If findings were desirable, they should be found specially. If the judge also wished to file an opinion, he would be able to do so without any rule to that effect. On the other hand, others thought any duty to make findings in all cases would be unduly burdensome, as for example, when on a single day many minor cases were set for trial and disposition.²⁵⁵ Mr. C. C. Graydon of Columbia, South Carolina would have required findings only if an appeal were taken. Mr. James E. Ruffin of the Criminal Division of the Department of Justice thought that it should not be left entirely to the judge as to whether he would find the facts specially, but that he should be required to do so upon request of any of the defendants made at the trial.²⁵⁶

The second preliminary draft (eighth committee draft) dated February 1944, made some changes. Rule 25(a) was identical with the present rule 23(a). Rule 25(b) was identical with the present rule 23(b), the phrase "at any time before verdict" being added. Rule 25(c) provided: "In a case tried without a jury the court shall make a general finding and may in addition find the facts specially."

The following comments were made to the Advisory Committee

²⁵⁴ Judge Alfred Barksdale of the Western District of Virginia, 1 *Id.* at 141. Mr. Robert M. Hitchcock of Dunkirk, New York thought the rule futile, since nothing in the rule is compulsory, and the judge already has the powers conferred under the rule. 1 *Id.* at 143.

²⁵⁵ Judge W. Calvin Chesnut of the District of Maryland. While the rule used the word "may" in practice, it might be construed as an expectation that the judge would make findings. Judge Gunnar H. Nordbye of the District of Minnesota thought the rule unclear, hence he would have inserted the words "at his discretion" after "in addition." It might be onerous to require special findings in all cases. 1 *Id.* at 142. Judge John B. Sanborn of the Court of Appeals for the Eighth Circuit would have substituted the following provision: "In a case tried without a jury, the determination of guilt or innocence may be in the form of a general finding, or the court may find specially the essential facts upon which the determination is based." He thought that in many cases a general finding of guilty or not guilty would be appropriate, and that the language in the rule as to filing an opinion was unnecessary as the court already had that power.

²⁵⁶ 2 *Id.* at 439.

on the second preliminary draft. With respect to subdivision (a), at the proceedings of the Judicial Conference for the Second Circuit, Judge Caffey of the Southern District of New York moved that the language "consent of the attorney for the government" replace the language "consent of the government,"²⁵⁷ and the motion was carried.²⁵⁸ The Committee on Criminal Law and Procedure of the Chicago Bar Association recommended striking out the language "with the approval of the court and the consent of the government waives a jury trial" and the substitution instead of "after being informed of his rights by the court voluntarily waives a jury trial." Mr. W. Y. Mauzy, United States Attorney for the Northern District of Oklahoma, did not think that waiver should be required to be in writing. Instead, he argued that the waiver should be made in open court and a proper minute made by the clerk of the court. The Special Committee of the Los Angeles Bar Association would have inserted after the word "writing" the words "signed in open court and after being advised of his constitutional rights by the court"; and after the word "government" the words "provided said defendant is represented by counsel or has waived counsel."²⁵⁹

With respect to subsection (b), some thought the rule objectionable, or at least unclear.²⁶⁰ Did the rule mean that three jurors might be left in the box, while nine were excused from further consideration? The rule should fix a limit on the number of jurors; or even better, the rule should be eliminated. Judge Fred L. Wham of the Eastern District of Illinois did not think that stipulations on waiver should be required to be in writing. Instead they should be entered on the clerk's minutes in open court with the defendant present in court and consenting with his counsel. One reason was simply that to require a writing would necessitate delay. A jury of less than twelve was also objected to.²⁶¹

²⁵⁷ 3 *Id.* at 85.

²⁵⁸ Mr. Harold M. Kennedy, United States attorney for the Eastern District of New York, would have used the language "and the consent of the attorney for the government" instead of "and the consent of the government."

²⁵⁹ 4 *Id.* at 53.

²⁶⁰ Judge Allen Cox of the Northern District of Mississippi thought that the rule was not clear. 3 *Id.* at 86. Did it mean that even after the trial were started and all the testimony in, seven or eight or nine men were to be left in the jury box and the remainder excused? Judge John McDuffie of the Southern District of Alabama objected along similar lines.

²⁶¹ Mr. Lloyd P. Stryker was opposed to a jury of less than twelve. Two alternates

With respect to subdivision (c) Judge Charles E. Wyzanski of Massachusetts thought that if a defendant were found to be not guilty, the judge should not make any special findings,²⁶² as the only purpose would be to characterize the conduct of the defendant. If the defendant were found guilty, special findings could be of aid in review of the case and would be appropriate. At the Judicial Conference of the Second Circuit, Judge Jerome Frank moved to change the word "may" to "shall" as to finding the facts specially, but the motion was defeated.

The Report of the Advisory Committee (ninth committee draft), dated June 1944, was identical with the second preliminary draft. The Supreme Court made no changes as to subsection (a) and (b). But as to subsection (c) the Court provided: "In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially." The Advisory Committee language had been: "In a case tried without a jury the court shall make a general finding and may in addition find the facts specially." As two of the rules were rejected by the Court, the rule became rule twenty-three, instead of rule twenty-five.

IV

RULE TWENTY-THREE AS CONSTRUED IN THE DECISIONS

A. Trial by Jury

The language in rule 23(a) "Cases required to be tried by jury shall be so tried" does not mean that there is to be a jury only in those cases where the Constitution requires it.²⁶³ There is also to be a jury where a statute requires it, and a statute may impliedly require it even though the offense is petty.

The issue of present insanity raised before the trial does not require trial by jury,²⁶⁴ and in such cases state law does not govern.

In 1951 the District Court of Guam stated:

"While it is recognized that the District Court of Guam is bound by the Federal Rules of Criminal Procedure under the Organic Act to the same

could be sworn at a long trial, thereby alleviating the likelihood of a mistrial in the event of illness or death of one of the jurors. 3 *Id.* at 86a.

²⁶² 3 *Id.* at 87.

²⁶³ *United States v. Great Eastern Lines, Inc.*, 89 F. Supp. 839, 840 (E.D. Va. 1950).

²⁶⁴ *United States v. Higgins*, 103 F. Supp. 481, 483 (S.D. Cal. 1952).

extent as if it had been mentioned in Rule 54 of such rules, in other territorial jurisdictions some provisions exists for jury trial. In this jurisdiction, neither local law nor the United States Congress has provided specifically for either a grand or petit jury. On the contrary Congress made it abundantly clear that in the exercise of local jurisdiction trial by jury would be dependent upon action by the Guam legislature.²⁶⁵

Subsequently the Court of Appeals held that a defendant in Guam had no right to trial by jury,²⁶⁶ yet strangely he had a right to indictment by a grand jury. In 1956, Federal Criminal Rule 54(a)(1) was amended so as to make the rules applicable to the District Court of Guam, the amendment becoming effective on July 8, 1956. An exception was made as to grand jury proceedings, but not as to trial by jury.

Under rule 23(a) the defendant has no absolute right to waive a jury trial and be tried by the court.²⁶⁷ The trial court may determine, in its sound discretion, whether there will be trial by jury or by the court, in spite of the defendant's request for trial by court. The statistics indicate that waiver is allowed in many cases.²⁶⁸ It has been held that the defendant in a petty case can waive without the consent of the Government, as there is no constitutional right to trial by jury.²⁶⁹

Should rule 23(a) be amended to provide for waiver of trial by jury upon request by the defendant? A judge has pointed out: "The requirement that the Government and the court must consent to the waiver has been criticized on the ground that this impairs the theory that the right to waive a jury is exclusively the privilege of the defendant."²⁷⁰ Under the New York Constitution of 1938, while ap-

²⁶⁵ *United States v. Seagraves*, 100 F. Supp. 424, 427 (D. Guam 1951). See *United States v. Pugh*, 106 F. Supp. 209, 210 (D. Guam 1952). For the Organic Act see 64 Stat. 390 (1951), 48 U.S.C. § 1424(b) (1958).

²⁶⁶ *Hatchett v. Government of Guam*, 212 F.2d 767, 769 (9th Cir. 1954) (two-to-one decision). Defendant was prosecuted for voluntary manslaughter. The same view was called down in *Mafnas v. Government of Guam*, 228 F.2d 283, 285 (9th Cir. 1955). See Catterlin, *Procedural Right to Jury Trial in an Unincorporated Territory*, 6 HASTINGS L.J. 197 (1955).

²⁶⁷ *Mason v. United States*, 250 F.2d 704, 705 (10th Cir. 1957). For citation to the rules in the state courts see *People v. Diaz*, 10 App. Div. 2d 80, 198 N.Y.S.2d 27 (1960).

²⁶⁸ *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 56 n.5 (2d Cir. 1948). During the fiscal year 1955, of 4087 criminal trials in federal courts, 1349 were court trials. Note, 65 YALE L.J. 1032, 1039 n.45 (1956).

²⁶⁹ *United States v. Au Young*, 142 F. Supp. 666 (D. Hawaii 1956).

²⁷⁰ *Carrión v. Gonzalez*, 125 F. Supp. 819, 822 n.4 (D. Puerto Rico 1954). He cited the following authorities: A.L.I. CODE OF CRIMINAL PROCEDURE § 266 (1931); 79 A.L.R. 563, 567 (1932); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO

proval of the court is necessary, consent of the prosecution is not.²⁷¹ An English writer has favored the requirement of consent by the prosecution unless trial is by a bench of three judges.²⁷²

Arguments against requiring consent of the Government to waiver of jury trial under rule 23(a) have been forcefully presented.²⁷³ Many important constitutional rights may be waived by the defendant without Government consent: double jeopardy, self incrimination, speedy trial, public trial, confrontation of witnesses, assistance of counsel, grand jury indictment, and venue. Furthermore, in a given case it may be impossible to obtain an impartial jury; hence there may be a violation of the sixth amendment which requires an impartial jury.²⁷⁴ In Smith Act cases it may be impossible to obtain an impartial jury in any federal district. It would be reasonable to interpret rule 23(a) to mean that the Government must act reasonably when it withholds consent to waiver. The American Law Institute Code of Criminal Procedure, section 266 permits waiver by the defendant alone. So does the law of eight states.²⁷⁵ The requirement of consent by the Government should be abolished and approval of the court should be required only to assure that waiver was intelligently made. As to the argument that judges may be biased, protection is afforded by the statutory procedure for disqualification of judges.

Could rule 23(a) be validly amended to provide for waiver of jury

APPEAL 393 (1947); Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 161 (1932); Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 736 (1927); 45 HARV. L. REV. 932 (1932); 27 ILL. L. REV. 447 (1932); 41 MICH. L. REV. 495 (1942); 6 TUL. L. REV. 660, 664 (1932).

²⁷¹ N.Y. Const. art. I, § 2. See *People v. Diaz*, 10 App. Div. 2d 80, 198 N.Y.S.2d 27 (1960). See 59 COLUM. L. REV. 813 (1959).

²⁷² Brunyate, *The American Draft Code of Criminal Procedure*, 49 L.Q. REV. 192, 198 (1933).

²⁷³ Comment, 65 YALE L.J. 1032 (1956). See also Donnelly, *The Defendants' Right to Waive a Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247 (1956). In 1956 a district court denied waiver by the defendant alone. *United States v. Silverman*, 132 F. Supp. 820 (D. Conn. 1955). This case is discussed in the articles.

²⁷⁴ A Court of Appeals has pointed out that a defendant who makes no effort to procure a trial by court runs the risk of hostility. *United States v. Rosenberg*, 195 F.2d 583, 596 (2d Cir.), cert. denied, 344 U.S. 838 (1952).

²⁷⁵ ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 397 (1947); Grant, *Our Common Law Constitution*, 40 B.U.L. REV. 1, 33 (1960); Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 161 (1932); Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 JOHN MARSHALL L.Q. 296, 301 (1943); Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 736 (1927); 36 N.D.L. REV. 143 (1960); 38 TEXAS L. REV. 928 (1960).

trial unless the defendant requests it? Strong arguments could be made in favor of such a proposal. Rule 38(d) of the Federal Rules of Civil Procedure so provides as to civil cases. Under the Puerto Rico law there is a waiver unless the defendant requests trial by jury, and this has been upheld.²⁷⁶ On the other hand, it could be argued that such implied waiver does not adequately protect a criminal defendant, and that it should be enough that the rule provides for express waiver by the defendant without the consent of the Government or the courts.

Must the defendant make an affirmative waiver personally, or may his counsel waive trial by jury for him? It was held by the Court of Appeals for the First Circuit that neither the constitution nor statutes of Puerto Rico required an affirmative waiver by the defendant personally. But rule 23(a) was held not to apply to the insular courts of Puerto Rico.²⁷⁷ If the defendant, being present, manifests no dissent to the waiver by his attorney, it is fair to assume that he approves of, or at least acquiesces in, the decision taken in open court in his behalf by his counsel. The court was in doubt whether the *Patton* case really held that a personal act by the defendant was required for a waiver; but, like the court below,²⁷⁸ the court assumed without deciding that a personal waiver was necessary. The lower court pointed out that there were no cases holding that under the federal constitution or under rule 23(a) the waiver must be personal. The drafters of rule 23(a) may have intended that the waiver be personal, since form forty-two provides for signature of the waiver by the defendant.²⁷⁹

It has been suggested that an agreement to accept a majority verdict is a waiver of trial by jury; hence the court must find the facts.²⁸⁰ But this reasoning was not followed in a case holding that a unanimous verdict cannot be waived.²⁸¹ It has also been suggested that the defendant's consent to such waiver is not intelligent, since he does not know which jurors he is waiving.²⁸²

May a defendant who has waived trial by jury withdraw his waiver?

²⁷⁶ *Carrión v. Gonzalez*, 125 F. Supp. 819, 821, 829 (D. Puerto Rico 1954), *aff'd* *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 619, 621 (1st Cir. 1956).

²⁷⁷ *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 617 (1st Cir. 1956). See also *Carrión v. Gonzalez*, 125 F. Supp. 819, 821 (D. Puerto Rico 1954).

²⁷⁸ *Carrión v. Gonzalez*, 125 F. Supp. 819, 823 (D.P.R. 1954).

²⁷⁹ *United States v. Shaw*, 59 Fed. 110 (D. Ky. 1893), had held that waiver by the defendant's attorney without the defendant's consent did not bind him.

²⁸⁰ 6 ALA. L. REV. 332, 335 (1954).

²⁸¹ *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953).

²⁸² 21 U. CHI. L. REV. 438, 444 n.50 (1954).

No cases construing rule 23(a) have raised this question. A case prior to the rules contains a dictum indicating that in some circumstances there may be a withdrawal.²⁸³ In Minnesota and Ohio, statutes provide that the waiver may be revoked at any time before the trial.²⁸⁴ In Connecticut²⁸⁵ and New Jersey²⁸⁶ the courts have held that withdrawal is at the discretion of the trial court. It seems sensible to leave the matter in the discretion of the trial court, subject to such rules for applying that discretion as the courts may develop.²⁸⁷

B. Jury of Less Than Twelve

One may waive trial by a jury of twelve in both felony and misdemeanor cases by stipulation of defendant's counsel with defendant's consent.²⁸⁸ While rule 23(b) calls for a stipulation in writing that the jury consists of less than twelve, collateral attack by motion to vacate the sentence under Section 2255 of the Judicial Code was not permitted where counsel for defendant had agreed that the trial proceed with eleven jurors when one of the original twelve became ill.²⁸⁹ The court stated that waiver must be intelligently made with the consent of the defendant. The waiver involved had not been *carte blanche* as to unknown contingencies, but had been agreed upon at the time the juror became ill. The court viewed a *carte blanche* waiver earlier in the proceeding as immaterial; the court had asked whether or not the defendant desired two alternate jurors or whether the defendant was willing to proceed with less than twelve if any juror became incapacitated and was excused. The court pointed out that prior to the present proceeding, the defendant had taken an appeal from the conviction and had failed to raise the point.

²⁸³ *Belt v. United States*, 4 App. D.C. 25, 36 (1894).

²⁸⁴ ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 394 (1947).

²⁸⁵ *State v. Rankin*, 102 Conn. 46, 127 Atl. 916 (1925).

²⁸⁶ *Edwards v. State*, 45 N.J.L. 419 (1883).

²⁸⁷ 5 N.Y. JUDICIAL COUNCIL REP. 153, 169 (1939).

²⁸⁸ *Fowler v. Hunter*, 164 F.2d 668, 669 (10th Cir. 1947). In this case, the defendant was tried by ten jurors. Twelve jurors had been impaneled and sworn to try the case. A recess was taken and two of the jurors failed to return. The defendant then stipulated for trial by ten, and was convicted. Release on habeas corpus was refused.

²⁸⁹ *Horne v. United States*, 264 F.2d 40, 41 (5th Cir. 1959). Rule 23(b) refers to stipulation by the "parties," whereas rule 23(a) mentions waiver by the "defendant." However, the court stated that it did not determine whether this variation in language indicated any difference between waiver of an entire jury and consent to trial by a jury of ten rather than twelve.

It has been argued that rule 23(b) is "but a step in the direction of majority verdicts," in that it is a method to eliminate the juror who might hold out for acquittal. Anyone with experience knows that often the judge and prosecutor have information as to how the jury stands, while the defense is in the dark on the subject.²⁹⁰ However, it is not at all clear that the judge and prosecutors always have such knowledge, although they might in particular cases.²⁹¹

C. Trial Without a Jury

In a trial by the court following a waiver of jury trial there is no occasion for a motion for judgment of acquittal under rule twenty-nine.²⁹² It is to be assumed on such a trial that the defendant is requesting acquittal at the court's hands, as he has pleaded not guilty. It follows that the appellate court may review the sufficiency of the evidence even though no motion for judgment of acquittal was made.

Rule thirty on instructions obviously has no application to jury—waived cases,²⁹³ since the judge need not instruct himself.

In one case, the fact that the trial judge, during the trial of a draft registrant for violation of selective service regulations, stated that he was not too sure that the defendant's failure to comply with the regulations had been deliberate did not establish that the judge had not found the defendant guilty, where the general findings at the end of the trial stated that the judge found the defendant guilty.²⁹⁴ Trials would never be concluded if judgments rendered after full consideration were reversed because of remarks made and tentative theories advanced by the trial judge in the course of the trial.

Courts occasionally make special findings of fact even though no request has been made therefor.²⁹⁵ This has even been done when the

²⁹⁰ STEWART, *FEDERAL RULES OF CRIMINAL PROCEDURE* 196 (1946).

²⁹¹ Note, 21 U. CHI. L. REV. 438, 444 n.50 (1954).

²⁹² *Miller v. United States*, 230 F.2d 486, 490 n.10 (5th Cir. 1956); *De Luna v. United States*, 228 F.2d 114, 116 (5th Cir. 1955). But while a motion for acquittal is not necessary, it may be made. *United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949); *United States v. Hufford*, 103 F. Supp. 859 (M.D. Pa. 1952); *United States v. Maryland & Virginia Producers' Ass'n.*, 90 F. Supp. 681, 684 (D.D.C. 1950).

²⁹³ *Cesario v. United States*, 200 F.2d 232, 233 (1st Cir. 1952).

²⁹⁴ *United States v. Wain*, 162 F.2d 60, 64 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947). The defendant made no request for special findings.

²⁹⁵ *United States v. Belville*, 82 F. Supp. 650 (S.D.W. Va. 1949). The defendant was found guilty. See *United States v. McHugh*, 103 F. Supp. 740, 742 (W.D. Pa. 1952).

defendant was acquitted.²⁹⁶ From a practical standpoint such findings are more important where the defendant is convicted,²⁹⁷ as there can be no appeal from an acquittal. Of course a defendant may have special findings made upon request, regardless of whether it turns out later that he is acquitted. Chief Judge Yankwich has stated: "Whenever the Government and the defendant in a criminal case waive a jury, they are entitled to not just a verdict one way or the other, but to the reasons behind it. This conforms to the Canons of Judicial Ethics of the American Bar Association (Canon 19) and to a practice which I have followed consistently."²⁹⁸ Where there are no specific findings, on review the Court of Appeals may rest on the general finding of guilty.²⁹⁹

Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings of fact under rule 23(c).³⁰⁰ But a Court of Appeals has held that in a prosecution for failure to pay social security taxes when the defendant repeatedly called the trial courts' attention to failure to apply the proper standards of guilt under the statute and the trial court's remarks at the time of the finding of guilt bore upon it, the defendant was entitled to raise the question of propriety of the trial court's conception of the constituent elements of the offense, although no formal request for special findings had been made.³⁰¹

The trial court is under a duty to make special findings upon timely request of the defendant.³⁰² If it fails to do so and convicts the defendant, the appellate court may order a new trial where the substantial rights of all parties would best be served thereby rather than ordering

²⁹⁶ *State of Maryland v. Chapman*, 101 F. Supp. 335, 337 (D. Md. 1951). This was a removal case. The defendant was acting in the course of his official duties as a federal officer. See also *United States v. Seagraves*, 100 F. Supp. 424, 429 (D. Guam 1951).

²⁹⁷ That special findings of fact are useful on appeal is pointed out in *Cesario v. United States*, 200 F.2d 232, 233 (1st Cir. 1952), and Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1296 (1952).

²⁹⁸ *United States v. Clark*, 123 F. Supp. 608, 609 (S.D. Calif. 1954). Canon 19 provides in part as to felonies: "In disposing of controverted cases a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel."

²⁹⁹ *Gojack v. United States*, 280 F.2d 678, 686 (D.C. Cir. 1960).

³⁰⁰ *Cesario v. United States*, 200 F.2d 232, 233 (1st Cir. 1952).

³⁰¹ *Wilson v. United States*, 250 F.2d 312, 325 (9th Cir. 1957), *rehearing denied*, 254 F.2d 391 (1958). Counsel for the Government did not raise the point of no request for special findings.

³⁰² *United States v. Morris*, 263 F.2d 594, 595 (7th Cir. 1959). The court pointed out that no Court of Appeals had ever passed on this problem.

the appeal held in abeyance pending the making of such findings by the trial court. The Court of Appeals stated that it did not decide whether in some cases the appeal might be held in abeyance so that the trial court could make a special finding.

Some oppose the requirement that trial judges in non-jury cases file special findings of fact. As Judge Jerome Frank stated, such findings suggest "that a trial judge's decision is a unique composite reaction to the oral testimony, a composite which ought not—or, rather, cannot without artificiality, be broken down into findings of fact and legal conclusions."³⁰³ Judge McClellan of the Advisory Committee in discussing rule 23(c) said: "We all know, don't we, that when we hear a criminal case tried we get convinced of the guilt of the defendant or we don't; and isn't it enough if we say guilty or not guilty, without going through the form of making special findings of facts designed by the judge—unconsciously of course—to support the conclusions at which he has arrived. Of course, he doesn't have to be concerned about special findings if he finds that the man is innocent."³⁰⁴ He thought that the rule should have given the judge discretion as to making findings. However, as Judge Frank concludes, "on net balance . . . a logical assaying by a trial judge of his decision has immense value, so that in a non-jury case special findings of fact by a trial judge are eminently desirable."³⁰⁵

A Court of Appeals has said that the effect of a finding of guilty by a judge sitting without a jury is the same as a jury verdict.³⁰⁶ The granting of a new trial in such a case is within the judge's discretion. On appeal, if there is competent and substantial evidence to support the finding and judgment, it will be sustained.³⁰⁷

The Federal Rules of Criminal Procedure make no provision for reviewing the sufficiency of the evidence to sustain a conviction in any different manner where trial is by the judge. Therefore, the Court of Appeals applies the rule that the evidence is to be considered in the light most favorable to the Government, reversing only if it concludes

³⁰³ *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 68 (2d Cir. 1948).

³⁰⁴ 6 PROCEEDINGS, N.Y.U. INST. ON FED. R. CRIM. P. 173 (1946). See also *Id.* at 198-99.

³⁰⁵ *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 69 (2d Cir. 1948).

³⁰⁶ *Mulloney v. United States*, 79 F.2d 566, 584 (1st Cir.), *cert. denied*, 296 U.S. 658 (1935). For the case below see *United States v. Mulloney*, 8 F. Supp. 674, 678 (D. Mass. 1934).

³⁰⁷ *United States v. Bach*, 151 F.2d 177, 178 (7th Cir. 1945); *Jabczynski v. United States*, 53 F.2d 1014 (7th Cir. 1931).

that there was no substantial evidence to support the verdict.³⁰⁸ The test is substantially the same as in reviewing the failure of the trial court to direct a judgment of acquittal under rule twenty-nine.³⁰⁹ In each case the appellate court passes not on the weight of the evidence, but on a question of law.

On appeal, in the absence of a request for special findings and no findings of fact by the trial judge, the Court of Appeals will state the facts as those which would support the judgment.³¹⁰

On proceedings to vacate a sentence, a court has applied rule 52(a) of the Federal Rules of Civil Procedure with respect to findings of fact.³¹¹ While that rule provides for finding the facts specially and stating separately the conclusions of law, if the findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision it is not reversible error for the findings to be found in the opinion of the court, or under the heading of "findings of fact" or "conclusions of law."

When a defendant is tried by the court for two offenses, and the court, in making inconsistent findings, acquits him of one offense, the defendant may not, because of double jeopardy, be tried again for the offense on which he was inconsistently acquitted.³¹² He may be tried again as to the other offense, however. The Supreme Court has affirmed inconsistent jury verdicts on separate counts of an indictment because of the jury's traditional power to import leniency into the law by rendering a verdict in the teeth of both the law and the facts.³¹³ As the above case points out, such considerations do not apply to court trials.

³⁰⁸ *United States v. Tutino*, 269 F.2d 488, 491 (2d Cir. 1959); *United States v. Dudley*, 260 F.2d 439 (2d Cir. 1958); *United States v. Owen*, 231 F.2d 831, 833 (7th Cir.), *cert. denied*, 352 U.S. 843 (1956); *United States v. Cook*, 184 F.2d 642, 644 (7th Cir. 1950); *Seefeldt v. United States*, 183 F.2d 713, 715 (10th Cir. 1950); *Jelaza v. United States*, 179 F.2d 202, 204 (4th Cir. 1950). See *United States v. Aman*, 210 F.2d 344 (7th Cir. 1954); Orfield, *Appellate Review of the Facts in Criminal Law*, 12 F.R.D. 311 (1952).

³⁰⁹ *De Luna v. United States*, 228 F.2d 114, 116 (5th Cir. 1955).

³¹⁰ *Blunden v. United States*, 169 F.2d 991, 992 (6th Cir. 1948).

³¹¹ *Alger v. United States*, 171 F.2d 667, 668 (7th Cir. 1948).

³¹² *United States v. Maybury*, 274 F.2d 899 (2d Cir. 1960), 1961 DUKE L.J. 133, 73 HARV. L. REV. 1616 (1960), 6 HOW. L.J. 225 (1960). See Mayers & Yarbrough, "*Bis Vexari*": *New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

³¹³ *Dunn v. United States*, 284 U.S. 390 (1931). Only one court has applied this rule to court trials. *McElheny v. United States*, 146 F.2d 932, 933 (9th Cir. 1944).

V

MODERN REFORM PROPOSALS

Until recently the petty jury has tended to become obsolete in England through the enlargement of the powers of courts of summary jurisdiction to try indictable offenses.³¹⁴ However, the Magistrates' Courts Act³¹⁵ of 1952 was a step in the opposite direction.³¹⁶ Any offense except assault, for which on summary conviction a sentence of imprisonment for more than three months can be imposed, shall be dealt with by indictment if at the hearing the defendant in person and before he pleads to the charge, claims trial by jury. When any person appears before justices upon a charge of such offense he must be informed of his right to jury trial before any evidence is taken.

England has a statute somewhat on the order of federal rule 23(b). Section fifteen of the Criminal Justice Act of 1925 provides:

[W]here in the course of a criminal trial any member of the jury dies or is discharged by the Court as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, subject to assent given in writing by or on behalf of both the prosecutor and the accused and so long as the number of its members is not reduced below ten, be considered as remaining for all the purposes of the trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.³¹⁷

The rule requiring written consent is strictly applied,³¹⁸ but the consent of the court is not required.

The English judge seems to make something similar to American findings of fact in appealable cases. Under Section 8 of the Criminal Appeals Act³¹⁹ the judge is to "furnish the registrar, in accordance with rules of court, his notes of the trial, and shall also furnish to the registrar in accordance with rules of Court a report giving his opinion upon the case or upon any point arising in the case." Rule 15(a) calls for a "report in writing, giving his opinion generally or upon any point arising upon the case of the appellant."³²⁰

Rule thirty-four of the Uniform Rules of Criminal Procedure

³¹⁴ ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 361 (1947).

³¹⁵ Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55.

³¹⁶ KENNY, *OUTLINES OF CRIMINAL LAW* 530 (17th ed. 1958).

³¹⁷ Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86.

³¹⁸ *R. v. Davis*, 26 Crim. App. R. 15 (1936).

³¹⁹ Criminal Appeal Act, 1907, 7 Edw. 7, c. 23.

³²⁰ See ARCHBOLD, *PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES* 308 (32d ed. 1949).

adopted by the Commissioners on Uniform Laws and approved by the American Bar Association is entitled "Trial by Jury or by the Court." It provides:

(a) *Trial by Jury: Waiver.* The defendant [with the approval of the court] [with the approval of the court and the consent of the prosecuting attorney] may waive a jury trial [in all cases except those in which such waiver is prohibited by law.]

(b) *Jury of less than Twelve.* Juries shall be of 12 but at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury will consist of any number less than 12.

(c) *Trial without a Jury.* In a case tried without a jury the court shall make a general finding and may in addition find the facts specially.

The comment to subdivision (a) points out that constitutions and statutes vary as to what may be waived and as to the manner of waiver with respect to consent of the court or the prosecuting attorney; hence, alternative provisions are stated in the brackets. It seems the clear implication of the drafters that waiver should be possible in all criminal cases without the consent of the court or the prosecuting attorney. Subdivision (b) is the same as federal rule 23(b). Subdivision (c), unlike the federal rule, does not make special findings mandatory on request.³²¹

The author of this article favors amendment of federal rule 23(a) to allow waiver by the defendant without the consent of the Government or of the court. While the *Patton* case required such consent, it is not at all clear that a rule of constitutional law, rather than of practice, was laid down.³²² The rights of the defendant will be best protected where he alone makes the choice between trial by jury and trial by the court.

The author, while at first doubtful that a judge trying a case without a jury should make special findings of fact on request of the defendant, is now inclined to think that the rule has worked well and that special findings are particularly helpful in cases that are appealed.

³²¹ The committee comment pointed out that rule 23(c) had been criticized in 6 N.Y.U. INST. ON FED. R. CRIM. P. 173, 198, 199 (1946); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 396 (1947); Dession, *New Federal Rules of Criminal Procedure*, 56 YALE L.J. 197, 225 (1947). Hence the language of the Preliminary Draft of the Advisory Committee was followed. Missouri rule 26.01(c) is similar.

³²² Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 256 (1956).

The possibility that judges will refuse to consent to waiver of jury trial because of the burden of making special findings could, of course, be eliminated by amending the rule to allow waiver without the consent of the court.

It has been proposed that juries be provided in all criminal contempt proceedings unless the contempt occurs within the actual presence of the court, thus requiring peremptory punishment to prevent demoralization of the court's authority.³²³ Many other safeguards available to a criminal defendant have been applied in criminal contempt cases, hence, why not trial by jury?³²⁴ Rule 42(b) on criminal contempt could be so amended, or rule 23(a), or both of them. There are, however, a number of possible alternatives. The contempt might be tried by another federal judge, or by a bench of judges, or possibly advisory juries might be called in to determine the facts. In any event a change in the present system seems desirable in order to better safeguard the rights of criminal defendants in contempt proceedings.

³²³ Note, 65 YALE L.J. 846, 858 (1956).

³²⁴ Trial without jury may result in narrowing the substantive law of contempt.

See Note, 65 YALE L.J. 846, 847-54 (1956).